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IN THE

# Supreme Court of the United States

OCTOBER TERM, A.D. 1968

No. 195 [redacted]

CHEMICAL TANK LINES, INC., a corporation, *Appellant*

v.

EDWARD W. HOLSTINE, *Appellee*

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**On Appeal From the Supreme Court of Appeals of West Virginia**

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## JURISDICTIONAL STATEMENT

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## JURISDICTIONAL STATEMENT

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Appellant Chemical Tank Lines, Inc., a corporation, appeals from the judgment of the Supreme Court of Appeals of West Virginia, entered on March 20, 1968, timely Motion to Reconsider being denied by the Supreme Court of Appeals of West Virginia on March 25, 1968. The Supreme Court of Appeals of West Virginia, after allowing an Appeal from the Circuit Court of Kanawha County, State of West Virginia and

granting a Writ of Supersedeas staying execution of the judgment, on March 20, 1968 dismissed said appeal by reason of Motion therefor by Appellee solely because of Appellant's failure to file a supersedeas bond as provided by West Virginia Statutes. Notice of Appeal was filed in the Supreme Court of Appeals of West Virginia, in the Circuit Court of Kanawha County, West Virginia, and in the Court of Common Pleas for Kanawha County, West Virginia on June 7, 1968. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

## OPINION BELOW

The opinion of the Supreme Court of Appeals of West Virginia is not reported and copies of the Court's Orders of March 20, 1968 and March 25, 1968 are attached hereto as Appendix "A".

## JURISDICTION

This is an Appeal from an order of the Supreme Court of Appeals of the State of West Virginia dismissing an Appeal previously granted to Appellant by said Court in a personal injury action originally instituted by Appellee in the Court of Common Pleas, Kanawha County, State of West Virginia, which resulted in a verdict in Appellee's favor in the sum of $350,000.00. After overruling Appellant's timely Motion for a New Trial and for judgment under Rules of Civil Procedure 50(b), judgment was entered on the verdict. Appellant petitioned the Circuit Court of Kanawha County, State of West Virginia, for Writ of Error or Appeal. Following refusal by that Court to assume jurisdiction, a Petition for Writ of Error or

Appeal and also for a Writ of Supersedeas was filed in the Supreme Court of Appeals of the State of West Virginia. An Appeal and Writ of Supersedeas were thereafter granted on September 11, 1967, the latter conditioned according to law. Thereafter, on March 20, 1968, solely by reason of Appellant's failure to file, within two months, pursuant to West Virginia Statute, Code 58-5-16, a supersedeas bond in the amount of $500,000.00 as fixed by the Court, the Appeal previously granted was dismissed. A timely motion to re-consider was summarily denied by said Supreme Court on March 25, 1968.

The jurisdiction of the Supreme Court of the United States to review this decision is conferred by Title 28 United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment of the Supreme Court of Appeals of West Virginia.

*Cheseboro* v. *Los Angeles County Flood Control District,* 306 U.S. 459, 83 Law Ed. 921, 923.

*Charleston Federal Savings & Loan Association, et al.* v. *George P. Alderson, State Tax Commissioner of West Virginia,* 324 U.S. 182, 89 Law Ed. 857.

*Warren W. Wilson, et al.* v. *Otho A. Cook, Commissioner of Revenues for State of Arkansas,* 327 U.S. 474, 90 Law Ed. 793.

*Clarence Norris, Petitioner* v. *State of Alabama,* 294 U.S. 587, 79 Law Ed. 1074.

## QUESTIONS PRESENTED

1. Did the Supreme Court of Appeals of West Virginia deprive Appellant of its constitutional rights and violate Amendment XIV of the Constitution of the

United States and Article 3, Section 10 of the Constitution of the State of West Virginia when, having granted an appeal from a judgment entered in the Court below in the amount of $350,000.00 and having further granted upon the same Petition, a Writ of Supersedeas to the judgment entered below, thereafter upon motion by Appellee, dismissed the Appeal and the Writ of Supersedeas awarded, solely because Appellant failed to file a supersedeas bond within the two month period prescribed by West Virginia Statute?

2. Did the Supreme Court of Appeals of West Virginia violate the constitutional rights of Appellant and the due process clause of the 14th Amendment to the Constitution of the United States in depriving Appellant of a hearing on the merits of an Appeal which it had previously allowed and in refusing to hold that Appellant was estopped from moving for a dismissal of the Appeal for failure timely to file a supersedeas bond, where Appellant's failure timely to file said bond was occasioned solely by its understanding that an agreement had been reached between the parties to waive the filing of the bond and to enter an Order thereon because Appellant had exhibited to Appellee uncontestable evidence that there was adequate insurance coverage to pay said judgment, interest and costs, if affirmed, and said bond was immediately filed when said agreement was disavowed by Appellee?

3. Did the action of the Supreme Court of West Virginia deprive Appellant of a constitutional right of an appeal involving, among other points, a trial Court's erroneous determination that Section 428 of the Restatement of the Law of Torts, Vol. II, was applicable and that operating trucks on the public highways in the United States "involves an unreasonable risk of

harm to others," and did this action by the trial Court deprive Appellant of its constitutional right to jury trial on this issue?

## STATUTES INVOLVED

Amendment XIV Constitution of the United States providing as follows:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

and Chapter 48, Article 5, Section 16, page 318, Michie's West Virginia Code providing as follows:

> "§ 58-5-16. TIME FOR PRESENTING RECORD AND GIVING BOND.
>
> "No process shall issue upon any appeal, writ of error or supersedeas allowed from or to a final judgment, decree or order, if, when the record is delivered to the clerk of the appellate court, eight months shall have elapsed since the date of such final judgment, decree or order; but the appeal, writ of error or supersedeas shall be dismissed whenever it appears that eight months have elapsed since such date before the record is delivered to such clerk, or that two months have elapsed since the date when the appeal, writ of error or supersedeas was granted before such bond is given as is required to be given before the appeal, writ of error or supersedeas takes effect."

Article 3, Section 10, Constitution of the State of West Virginia providing as follows:

"No person shall be deprived of life, liberty or property, without due process of law, and the judgment of his peers."

## STATEMENT OF THE CASE

Appellant, Chemical Tank Lines, Inc., a Delaware Corporation, doing business in the State of West Virginia, hauled raw chemicals from West Virginia plants to processors and manufacturers in other states. It owned its own trailers and leased tractors to haul them, including the drivers thereof, but such drivers were subject to approval by Chemical.

Immediately before April 10, 1965, Holstine, plaintiff below, applied to Brumfield, tractor owner and a defendant below, for a position as driver and was referred to Chemical Tank Lines safety director, who passed him for employment. On April 9th he undertook, with another driver, a trip from Charleston, West Virginia to Akron, Ohio. By reason of the admitted and stipulated negligence of the driver of the tractor, Holstine was injured in Ohio on the early morning of April 10, 1959.

A Declaration was filed in the Court of Common Pleas in Kanawha County, West Virginia to the May 1960 Rules of that Court in accordance with the then West Virginia procedure. In October 1960, special Pleas were filed by Brumfield and Chemical Tank Lines alleging each was covered by Workmen's Compensation, and that Holstine was an employee and hence prohibited by West Virginia Statute from suing his employer.

In October 1965, replications were filed to these special pleas admitting the truth thereof but denying the legal effect thereof. A jury verdict ensued with a

judgment against Chemical Tank Lines for $350,000.00. On his Motion, Brumfield was dismissed as a defendant, as being an independent contractor covered by Workmen's Compensation. Motions for New Trial and Judgment under West Virginia Rules Civil Procedure 50(b) were timely filed.

The trial Court, in effect and substance, directed a verdict for Appellee herein by its application of Section 428 of the Restatement of Torts. It held and instructed the jury that the driving of a tractor trailer in Interstate Commerce involved an unreasonable risk of harm to others so as to cause an employer to be liable for the negligent acts of an employee of an independent contractor. Appellant herein contended in the trial and Appellate Courts that such a ruling was in violation of its constitutional rights under the Constitutions of both the State of West Virginia and the United States, and further that such holding constituted an unlawful burden on Interstate Commerce.

All Motions of the Appellant were overruled by the trial Court. A proper and timely record was prepared and filed, including a full transcript of the testimony and a Writ of Error was sought from the Circuit Court of Kanawha County, West Virginia. On May 10, 1967, the Circuit Court of Kanawha County refused to grant the Writ, and required a cost bond for Appeal to the Supreme Court of Appeals for West Virginia, which was properly signed and filed on that day with the Clerk of said Circuit Court.

On June 23, 1967, the entire record, together with a Petition for an Appeal or Writ of Error and a Writ of Supersedeas was presented to the Supreme Court of Appeals of West Virginia. On September 11, 1967, an appeal was allowed. And, a Writ of Supersedeas

granted, providing Appellant file with the Circuit Court a bond in the amount of $500,000.00, conditioned according to law.

Thereafter, counsel for Appellant entered into negotiations with counsel for Appellee whereby it was agreed that could counsel for Appellant furnish proof that there was adequate and uncontestable insurance coverage, to satisfy the entire judgment, interest and cost, if affirmed, that an agreed Order waiving the filing of a supersedeas bond in the amount of $500,000.00 would be entered in the Supreme Court of Appeals of West Virginia. Letters contained in the record from counsel for Appellant and counsel for one of the insurance companies that he represented as well as the affidavits of counsel representing both parties corroborate this statement.

Such information was furnished counsel for the Appellee, plaintiff below, and a proposed Order was presented to Appellee's counsel by Appellant's counsel for signature. No further action was taken by Appellee nor any notice given to Appellant until after the two months set by statute for the filing of the bond had expired, at which time a Motion to dismiss the Appeal was made by Appellee solely because said bond had not been filed.

Other intermediate Motions had previously been made contending the Appeal had been improvidently allowed because of Appellant's failure to comply with the statutory proceedings in presenting the Appeal. These were never decided by the Supreme Court of Appeals of West Virginia.

Such Motion to Dismiss for failing to file bond was filed without prior notice to counsel for Appellant who

did not receive notice thereof until subsequent to the filing. Said Motion was supported by Affidavits taken ex parte, all in violation of the rules of practice of the Supreme Court of Appeals of West Virginia and additionally, it was filed by counsel who was not then a counsel of record in the case. On the following day, a proper and adequate bond in the amount of $500,000.00 was filed with the Circuit Court of Kanawha County as provided by law.

Motion was thereafter made by Appellant to dismiss the Motion to Dismiss; briefs were filed, and on February 6, 1968, the Supreme Court of Appeals set down for argument all preliminary Motions, among which was the Motion to Dismiss for Failure to File Bond.

Argument was set on the 19th day of March, 1968, argument had, and on the following day, March 20, 1968, the Supreme Court of Appeals of West Virginia entered its Order dismissing the Appeal solely on the grounds of Appellant's failure to timely file the bond as prescribed by West Virginia Statute, Code 58-5-16, as amended, and on the further ground that such filing was mandatory to complete jurisdiction and that the Court had no further jurisdiction of the matter. Several days following, a Motion to Reconsider and Reinstate was filed by Appellant in the Supreme Court of Appeals of West Virginia, setting out that such dismissal based upon said Statute was in contravention of the constitutional rights of the Appellant, violating the provisions of both the Constitution of the State of West Virginia, Article 3, Section 10 providing as follows:

> "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers."

And the Constitution of the United States, Amendment XIV, providing as follows:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The following day, March 25, 1968, the Supreme Court summarily refused the Motion to Reconsider but granted a stay to appeal to the Supreme Court of the United States in accordance with West Virginia Statutes.

Thereafter, under and by virtue of Rule 4, Section 11 of the Rules of the Supreme Court of Appeals of West Virginia, a Motion was filed by Appellant to reinstate the Appeal, said Rule stating in its pertinent parts as follows:

> "When by these rules . . . an act is required or allowed to be done at or within a specified time, this Court, or a Judge thereof, or the Judge, for cause shown may at any time, in term or vacation in its discretion . . . (2) upon motion made after the expiration of the specified period permit the act to be done where good cause is shown for the failure to act."

said Motion requesting the Court to enlarge the time within which the supersedeas bond could have been given to include the period up to the time when said bond was filed which was 17 days after the expiration of the two months. Such Motion was likewise denied by the Supreme Court of Appeals of West Virginia on April 22, 1968.

Substantial questions were raised on the Appeal, the first of which was whether or not Appellant's rights under the Constitutions of the State of West Virginia and the United States were violated by the action of the trial Court in applying Section 428 of the Restatement of Torts. The trial Court held that all trucks traveling the highways of the United States involved an unreasonable risk of harm to others, by reason of which, in substance, a directed verdict was given by the trial Court to the Appellee. The dismissal of the Appeal by the Supreme Court of Appeals of West Virginia deprives Appellant of a review of this important constitutional question.

Secondly, after testimony that Appellee had been paid $20.00 for a portion of one night's work, and over objection and motion for mistrial made by counsel for Appellant, counsel for Appellee without evidence of any reasonable expectancy of future employment was permitted to exhibit to the jury a large chart showing that future wages of more than $200,000 were lost, all in violation of the unanimous decisions of the Supreme Court of West Virginia which require proof of loss of future earnings to be made to a reasonable certainty.

And lastly, whether or not the motion for judgment notwithstanding the adverse verdict should not have been sustained by virtue of the fact that the Appellee Holstine's exclusive and sole remedy was under the workmen's compensation laws of the State of West Virginia.

The above questions including the substantial federal questions here involved were properly raised below, the federal question concerning the dismissal for failure to file bond could and did arise only after said motion to dismiss was made.

## THE QUESTIONS ARE SUBSTANTIAL

I. The issues involved in this Appeal appear to be those of first impression in this Court and Appellant is unable to find any cases previously passed upon by this Court in which the issues seem identical or even analogous except as to Appellant's second point dealing with estoppel. Constitutional questions were initially raised by Appellant in the Court of Common Pleas of Kanawha County, West Virginia and thereafter additional constitutional questions were raised in the Supreme Court of Appeals of West Virginia after that Court entered an Order dismissing an Appeal and Writ of Supersedeas previously granted by it solely because of Appellant's failure to comply with a Statute of West Virginia which required the filing of a supersedeas bond within two months following the entry of an Order granting Appellant an Appeal and Writ of Supersedeas. On timely Motion to Reconsider, Appellant urged the unconstitutionality of said statute and its violation of the Constitutions of both the United States of America and of the State of West Virginia.

Since the Appellant contends that the trial Court had in substance directed a verdict for Appellee, thus depriving Appellant of a trial by jury and the "judgment of his peers" as provided by the Constitution of the State of West Virginia to dismiss this appeal without granting the Appellant a hearing on the merits deprived Appellant of its property without due process of law and likewise violated both the Constitutions of the United States of America and the State of West Virginia.

Amendment XIV of the Constitution of the United States provides in part:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 3, Section 10 of the Constitution of the State of West Virginia provides:

> "No person shall be deprived of life, liberty or property, without due process of law, and the judgment of his peers."

The Ninth Circuit held in the case of *Collins* v. *Welsh*, 75 F.2d 894, 897 that rights acquired by a judgment are property rights which cannot be taken without due process of law. To permit the Appellee to enforce a money judgment in the sum of $350,000.00 solely by reason of Appellant's failure timely to file a bond as required by West Virginia Statutes where the Supreme Court of Appeals of the State of West Virginia had previously found that there were good and sufficient issues raised to award an appeal,* clearly constitutes a violation of Appellant's constitutional rights and constitutes a taking of its property without due process of law, all in violation of the rights guaranteed to the Appellant under the Constitutions of the United States of America and the State of West Virginia.

The issue presented in this Appeal is unique in that Appellant contends that there has been a violation of

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* Article 8, Section 6, Constitution of West Virginia provides for the allowance of an appeal "only after said court or judge shall have examined and considered the record and assignment of errors, and is satisfied that there is error in the same, or that it presents a point proper for the consideration of the supreme court of appeals."

the due process clause of the 14th Amendment by a State Court of Last Resort. This violation is based upon an arbitrary denial of a basic right previously conferred and allowed by the West Virginia Supreme Court because Appellant failed timely to file a supersedeas bond. Appellant has been deprived of its right to have its Appeal heard by the highest Court of West Virginia on a technical ground, after that Court had determined that a sound basis for the appeal existed. In the State of West Virginia, there is no appeal as a matter of right such as exists in many other Courts of Last Resort and in the Circuit Courts of Appeal but a petition for an Appeal may be filed as was done by Appellant on May 23, 1967. On September 11, 1967, an Appeal was awarded Appellant, process thereon was issued, completed and filed, and the right to be finally heard on such Appeal was then taken away by the West Virginia Supreme Court of Appeals for a reason entirely unconnected with the right to appeal or the questions involved. (Article 8, Sec. 6, Constitution of West Virginia). The West Virginia Court relied solely upon a Section of the Code of West Virginia, 58-5-16 is dismissing Appellant's appeal. This provision states:

> "§ 58-5-16 TIME FOR PRESENTING RECORD AND GIVING BOND.
>
> "No process shall issue upon any appeal, writ of error or supersedeas allowed from or to a final judgment, decree or order, if, when the record is delivered to the clerk of the appellate court, eight months shall have elapsed since the date of such final judgment, decree or order; but the appeal, writ of error or supersedeas shall be dismissed whenever it appears that eight months have elapsed since such date before the record is delivered to such clerk, or that two months have elapsed since the date when the appeal, writ of error or super-

sedeas was granted before such bond is given as is required to be given before the appeal, writ of error or supersedeas takes effect."

Such a statute has been held to be mandatory by the highest Court of that State, contrary to its previous decisions and those of the vast majority of our states who have determined that similar statutes are not jurisdictional.* It is Appellant's position that said Statute was not mandatory as to jurisdiction and it is unconstitutional in that the jurisdiction of the Supreme Court of Appeals of West Virginia is given by the Constitution of West Virginia and may not be abrogated by the Legislature.** To deny an Appeal which it has previously granted constitutes an arbitrary and unreasonable exercise of power by the West Virginia Court. The Writ of Supersedeas has absolutely *nothing to do with the Appeal and invokes only a* stay of execution during appeal.

Article 8, Section 1 of the Constitution provides that judicial powers of the State shall be vested in the Supreme Court of Appeals to consider a case in which it had already granted the right to have it so determined by the awarding of the Writ of Appeal. The enactment by the legislature of the State of West Virginia of a Statute (Code 58-5-16) requiring the Court to dismiss an appeal previously granted because of a failure to file a supersedeas bond as required by the Statute is an

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* *Schulenburg* v. *Signatrol*, 37 Ill. 2d 352, 226 N.E. 2d 624
*Castilleja* v. *Camero*, 402 S.W. 2d 272, Texas
*Barker* v. *Blankenship*, 271 Ky. 213, 111 S.W. 2d 592
*Casanova* v. *Kreuseh*, 21 W. Va. 720
*Sites* v. *Weiland*, 5 Leigh 80 (Va.)
*Southwest Virginia Hospitals* v. *Lipps*, 193 Va. 191, 68 S.E. 2d 82

** Article 8, Section 3.

invasion of the powers of the Judiciary. Hence the dismissal of the Appeal by the Supreme Court of Appeals of West Virginia in reliance upon such statutes was in violation of both the Constitution of West Virginia and the Constitution of the United States of America.

Appeals may be granted without supersedeas so that the writ for the granting of an appeal and the writ granting supersedeas are separate and distinct matters under Code of West Virginia (58-5-12); hence, the failure to perform one part would not effect the granting of an appeal.

This historical difference, as will be later set out, is recognized in Code of West Virginia under the title "Appeal and Error", Chapter 58, Article 5, Section 12, in which it is stated:

> "The clerk of the appellate court shall thereupon issue a summons against the parties interested, other than the petitioners, that they may be heard, *and also* issue any supersedeas which may be awarded, which summons or supersedeas may be served upon the party in person or his attorneys in the court from which the appeal or writ of error is taken." (Italics ours)

This follows Section 10 which provides:

> "The Court or Judge to whom a petition (for an Appeal, Writ of Error or Writ of Supersedeas) is duly presented, if our opinion that the decision complained of ought to be reversed, may allow an appeal, writ of error *or* supersedeas, and may stay proceedings in whole or in part." (Parenthesis and Italics added).

In Section 12 above quoted, it will be noticed that the Code provides that a summons shall be issued

against the parties interested, "and also issue any supersedeas which may be awarded." Therefore, the allowing of an appeal or awarding of supersedeas are two separate and distinct matters. In fact, in the case at bar, the Appeal was awarded as disclosed by the record, summons was issued against all Appellees, service was accepted by an attorney of record, and the process thus completed was timely returned to the Clerk of the Supreme Court of Appeals of West Virginia from whose office the summons had originated.

In the case of *N & W Railway* v. *County Court,* 123 W. Va. 461, 15 S.E. 2d 574, the Court stated at page 464:

> "Supersedeas is now regarded and generally used as an ancillary process in conjunction with a writ of error. The latter writ brings a certified copy of the record before the reviewing Court, but *does not suspend the operation of the final judgment. That function is performed by the supersedeas,* the order awarding which *ordinarily* requires the giving of a bond conditioned upon the satisfaction of the judgment before the writ issues. However, due to the fact that our present statute, or its equivalent, was first enacted in the State of Virginia in the Virginia Code of 1819, and since the meaning of a statute is not to be altered by a change in the meaning attached to its terms by popular usage since its enactment, it would seem to be necessary to interpret our present statute in accord with the meaning of the word 'supersedeas' at the time of its original enactment, it having been transmitted to us through the Virginia Code of 1849, that being the last enacted codification prior to this State's formation.
>
> "Going back no further than the Virginia Code of 1819, we believe that it may safely be asserted that at that time *the writ of supersedeas was an*

*original process of an appellate court, the operation of which was dual,* since it brought the record of the proceedings before the appellate court and held in abeyance the effect and operation of the order or judgment of the inferior tribunal.

"Treating our present statute in the light of that definition of the word supersedeas, we are of the opinion that in a summary statutory proceeding questioning the validity of a levy, *the actual issuance of a writ of supersedeas is a condition precedent to the reviewing court acquiring jurisdiction.* The entire levy must be suspended and a separate part of it cannot be questioned due to the fact that an error affects the whole . . ." (Emphasis added).

It is Appellant's contention that the Appeal is separately granted. The giving of a supersedeas bond in compliance with the Writ of Supersedeas granted is a separate and distinct matter. Even if the bond was not given within proper time, the Court should only have dismissed the Writ of Supersedeas and proceeded with the Appeal, because the two were not connected.

Additionally, the Supreme Court of Appeals of West Virginia could and should have granted additional time for good cause shown, for the execution of a valid and collectible bond to put into effect the Writ of Supersedeas, before dismissing the case. The Court had an opportunity to do so when a petition was filed on April 5, 1968 in accordance with the Court's own Rule IV, Section 11* requesting it to enlarge the time for

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* *"When by these rules, or by a notice given thereunder or by order of this court, an act is required or allowed to be done at or within a specified time, this court, * * * for cause shown may at any time, * * * in its discretion * * * (2) upon motion made after the expiration of the specified period permit the act to be done where good cause is shown for the failure to act."*

filing supersedeas bond to include November 29, 1967 when said bond was actually filed but on the 22nd day of April, 1968 refused to do so.

The giving of a bond for costs by Appellant on May 10, 1967, was sufficient here to act as an appeal bond, because the amount of $5,000 was adequate.

In 1(b) Michie's Jurisprudence under the heading "Appeal and Error" it is stated in Section 159, page 263:

> "The appeal or writ of error, if granted, may be with or without supersedeas. The effect of a supersedeas is to suspend the enforcement of the judgment or decree; in all other respects it leaves the matters as they were when the supersedeas took effect, until the appeal is decided."

And in Section 148, page 254 appears this statement:

> "An appeal or writ of error may be granted with or without supersedeas as requested . . .
>
> "A supersedeas bond is one of indemnity, the object of which is to secure to a successful litigant the ultimate fruits of his recovery . . . and to insure him against loss from the possible insolvency of his debtor, or from other cause, pending the appeal."

And in Section 166, page 266, entitled "Supersedeas", it is further stated:

> "During the early days of the commonwealth of Virginia a supersedeas was an independent process by which the record was brought up for review by a superior court, and further proceedings in the cause in the court below were stayed. But it is now, and has long been, in practice at least, merely an *auxiliary* process used as an adjunct

> to an appeal or writ of error. It operates to stay all further proceedings on the judgment, or as to any matter embraced therein. Under the present statutes the appellate court may grant the appeal or writ of error with or without supersedeas."

That section states that also it is now provided in Virginia that where an appeal or writ of error is granted without supersedeas and later an occasion arises for it, the Court may, upon motion of the Appellant, grant a supersedeas, fix the amount thereof and the time within which bond shall be given. See *Casanova* v. *Kreusch,* supra.

It will be noted that the West Virginia Court held that the requirement for giving a bond was a requirement for an adequate and sufficient bond. The Court further held that when the bond was insufficient, it could and would allow Appellant an additional time within which to file a good and sufficient bond; thus showing the matter is not jurisdictional, but discretionary.

That Court held that even though Appellant had failed within the time limit of the Statute after having the case dismissed in the Court of Appeals, to deposit with the Clerk a sufficient amount to pay for the printing of the record, the case would be dismissed, but even though dismissed a second writ of error would be awarded the plaintiff in error "as a matter of course".

Again, to show that the bond for appeal was different from that provided by the Writ of Supersedeas, the Court in *Casanova,* supra, said:

> "The Legislature in February 1825, passed an act authorizing appellate courts to allow writs of

> error or appeal upon bond or security being given for the costs of a writ of error or appeal only; provided such writ of error or appeal should not operate as a supersedeas to the judgment or decree entered below."

To demonstrate that the matter was not jurisdictional, the Court cited *Sites* v. *Weiland,* 5 Leigh 80 (Va.), wherein the Statute said that when the record was not filed within six calendar months, "such appeal, writ of error or supersedeas shall be dismissed *unless good cause be shown to the contrary.*" (Italics ours).

The Court concluded that where a writ of error or appeal has been dismissed because of the failure of the Appellant to give a new bond with security when required by the Court, that the party is not entitled to a second writ of error without supersedeas.

The Supreme Court of Appeals of West Virginia relied on *Scott* v. *Coal & Coke Railway Co.,* 70 W. Va. 777, 74 S.E. 992 and *State* v. *Legg,* 151 W. Va. 401, 151 S.E. 2d 215. The first case merely upholds the point that a supersedeas is a different and separate writ from an Appeal while the second is a criminal case and wholly inapplicable. The reasoning of the Court in *Legg,* supra, which the Court has utilized here is completely contrary to recent decisions of this Court; the West Virginia Court having held "A right of review in criminal cases is not a necessary element of due process of law and it is wholly within the discretion of each state to refuse it or grant it on terms . . ." *

It is quite true that the awarding of a Writ of Supersedeas does not suspend the execution of judg-

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* See *Douglas* v. *California,* 372 U.S. 353 to the contrary and also *Griffin* v. *Illinois,* 351 U.S. 12.

ment until the required bond is given. During the interim, the judgment-holder below has the right to collect on his judgment or pursue any course for the collection of it. The supersedeas bond merely stays the enforcement of the judgment given below until the matter is heard by the appellate court. If the bond is not given, then there is no stay prohibiting the judgment creditor from making collection.

Concluding this point, Appellant submits that it has conclusively established a violation by the Supreme Court of Appeals of the State of West Virginia of the constitutional rights of Appellant and its Order entered was arbitrary, capricious and unlawful.

II. The record in this case contains affidavits, letters and a brief filed by Appellant's counsel demonstrating that Appellant's attorney was acting under the honest impression that based upon negotiations between counsel for the Appellant and Appellee the supersedeas bond in the sum of $500,000.00, as fixed by the Supreme Court of Appeals of West Virginia, would be waived and an appropriate consent Order entered. Seventeen days following the expiration of the statutory period set forth in West Virginia Statute 58-5-16, Appellee's attorneys made a motion to dismiss the Appeal for failure to timely file the supersedeas bond, which motion was subsequently granted by the Supreme Court of Appeals of West Virginia solely on that ground. On the following day the bond was filed. It is the contention of Appellant based on the affidavits of all counsel and the documentary evidence, that counsel for Appellees were estopped by their actions from seeking a dismissal of this case because of the failure to file the supersedeas bond.

A sound basis for Appellant's position is found in *Glus* v. *Brooklyn Eastern District Terminal,* 359 U.S. 231, 3 L.ed 2d 770, 79 S. Ct. 760.

There the plaintiff brought an action under the Federal Employers' Liability Act to recover damages for an industrial disease he allegedly contracted in 1952 while working for the defendant. The action was brought after the statutory 3-year period of limitation (§ 6 of the act) had lapsed, but plaintiff claimed that defendant was estopped from raising this limitation because it had induced the delay by representing to him that he had 7 years in which to sue. The District Court dismissed the action on the ground that the defense of estoppel was not available against the statute of limitations contained in the Federal Employers' Liability Act, the statutory provision being an integral part of a new cause of action created by that act. The Second Circuit affirmed.

On certiorari, the Supreme Court unanimously reversed, holding, in an opinion by Black, J., that the doctrine of estoppel could be invoked by the plaintiff, that it was error for the trial court to dismiss the action, and that whether plaintiff could in fact make out a case calling for application of that doctrine must await trial. In speaking for the Court, Justice Black stated on page 772:

> "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations. In Schroeder v. Young, 161 US 334, 40 L ed 721, 16 S Ct 512, this Court allowed a debtor to redeem property sold

to satisfy a judgment, after the statutory time for redemption had expired although the statute granting the right to redeem also limited that right as to time. The Court held that the purchasers could not rely on the limitation because one of them had told the debtor 'that he would not be pushed, that the statutory time to redeem would not be insisted upon, and [the debtor] believed and relied upon such assurance.' The Court pointed out that in 'such circumstances the courts have held with great unanimity that the purchaser is estopped to insist upon the statutory period, notwithstanding the assurances were not in writing and were made without consideration, upon the ground that the debtor was lulled into a false security.' 161 US, at 344. As Mr. Justice Miller expressed it in Union Mut. L. Ins. Co. v. Wilkinson (US) 13 Wall 222, 233, 20 L ed 617, 622, 'The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim.' "

It is the contention of the Appellant that it was denied its right of due process and final hearing by the failure of the Supreme Court of Appeals of the State of West Virginia to determine whether or not the evidence offered by the Appellant was sufficient to invoke the doctrine of estoppel and thus result in a prohibition from utilization of West Virginia Statute

58-5-16, in the event this Court holds such Statute and its application to be constitutional.

III. It is the contention of the Appellant that the trial Court's application of Section 428 of the Restatement of the Law of Torts* was clearly erroneous and unconstitutional and that the action of the Supreme Court of Appeals of West Virginia deprived the Appellant of its constitutional right to a hearing and a decision on the constitutionality of this issue.

In order to apply this section, it was necessary for the trial Court to make a determination as a matter of law that operating trucks on the public highways of the United States "involves an unreasonable risk of harm to others". That the driving of any motor vehicle involves a risk can hardly be disputed; that the trucking industry "involves an unreasonable risk of harm to others" is without basis either in law or in fact. There was no evidence of any kind introduced during trial by reason of which the Court as a matter of law could have made such a determination. It was a controverted issue, and should only have been submitted to the jury if competent evidence had been introduced. The Court simply stated and held as a matter of law that the operation by Chemical Tank Lines, Inc. of tractor-trailers over the United States "involves an unreasonable risk of harm to others" and therefore Appellant became liable for the negligence of the employee of an independent contractor employed to carry on such work.

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* "An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity."

The trial Court after long discussion and consideration and claim made by Appellant as to the unconstitutionality thereof, granted Appellee's Motion to give Instruction No. 12, as amended, Transcript of Evidence 2066, as follows:

> "The Court instructs the jury that under the law in this case Chemical Tank Lines, Inc., is liable for any negligent acts of Dale Samples while operating the tractor trailer in which Edward Holstine was injured, is to be considered by the jury as negligence of Chemical Tank Lines.
>
> "You are therefore accordingly instructed that because of the stipulation in this case that Dale Samples was negligent in operating the tractor-trailer, and therefore if you believe from a preponderance of the evidence in this case that Dale Samples' negligence proximately contributed to the accident in question and to Edward Holstine's injuries, then Chemical Tank Lines, Inc. is chargeable with the negligence of Dale Samples and your verdict may be for the plaintiff, Edward Holstine and against the defendant, Chemical Tank Lines."

The Appellants contend that this was in substance a directed verdict for the Appellee and the Court did so admit (T 1981, 2052) in stating as follows: "As a practical matter, I agree with you that it is tantamount to a directed verdict, and theoretically, it is not."

The Appellant contended in the trial Court, in the Circuit Court, and in the Supreme Court of Appeals for the State of West Virginia that such a holding, with or without evidence to support it, and there was none here, constituted a taking of Appellant's property without due process of law, and violated both the Constitutions of the United States of America and the State

of West Virginia. This point was argued extensively to the trial Court originally and Appellant's contention was there overruled.

Nor did the Restatement of the Law of Torts ever contemplate encompassing the entire trucking industry. No case has been located in which Section 428 has been applied to a member of the industry, that is to a truck driver, even though the doctrine might conceivably be applied in extreme cases as to members of the general public.

If the position of the trial Court in this case is correct, it will have the effect of creating an entirely new concept of liability, seemingly effecting the entire trucking industry. Such an indictment of the trucking industry will make it an absolute insurer of all other persons and vehicles on the highway.

It is the contention of Appellant that such a result is not only improper but is discriminatory and unconstitutional, and an unlawful burden upon Interstate Commerce.

## CONCLUSION

In conclusion, it is submitted that the decision of the Supreme Court of Appeals of West Virginia was erroneous and unconstitutional, in dismissing the Appeal which that Court had previously granted to Appellant. We believe that the questions presented by this Appeal are substantial and that they are of public importance. This Court should overrule the

decision of the Supreme Court of Appeals of West Virginia and direct it to reinstate Appellant's Appeal.

Respectfully submitted,

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ALBERT L. BASES
27 William Street
New York, New York

*Counsel for Appellant*

# APPENDIX

## APPENDIX A

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 20th day of March, 1968, the following order was made and entered, to-wit:

12693

EDWARD W. HOLSTINE, Plaintiff Below, *Appellee*

vs.

CHEMICAL TANK LINES, INC., a corporation, and GARLAND BRUMFIELD, Defendants Below, CHEMICAL TANK LINES, INC., a corporation, *Appellant*

Upon an appeal from and supersedeas to a judgment of the Circuit Court of Kanawha County, rendered on the 10th day of May, 1967.

On a former day, to-wit, March 19, 1968, came counsel for the appellee and appellant in this proceeding and submitted and argued the several written motions upon jurisdictional matters with briefs in support thereof, pursuant to a former order of this Court, entered herein on February 6, 1968, and the Court takes time to consider of its judgment on these several motions.

This day, upon consideration of such motions, the Court is of the opinion that the motion of appellee, plaintiff below, heretofore filed on November 28, 1967, to dismiss this appeal and supersedeas on the ground that the appellant failed to execute the appeal and supersedeas bond as fixed by this Court within the two months period as required by the statute and Rules of Practice in this Court should be sustained, and that the motion of appellant, defendant below, filed on December 21, 1967, to dismiss such motion of appellee for reasons stated therein should be overruled; that by reason thereof, the Court is further of the opinion

that it becomes unnecessary to consider the further motion of appellee, plaintiff below, filed herein on December 5, 1967, and the two other motions of appellant, defendant below, filed herein on December 21, 1967, or any other motions of counsel heretofore filed.

It is therefore considered and ordered that the appeal and supersedeas heretofore granted in this action, be, and the same is hereby dismissed from the docket of this Court for failure to timely file appeal and supersedeas bond as provided in Code, 58-5-14, as amended, and Code, 58-5-16, and in accordance with the principles stated in case of Scott vs. Coal & Coke Railway Company, 70 W. Va. 777; 74 S.E. 992. See also State vs. Legg, 151 W. Va. 401; 151 S.E. (2nd) 215; all of which is ordered to be certified to the Circuit Court and Court of Common Pleas of Kanawha County.

A True Copy

Attest: KENNETH E. HINES
*Clerk Supreme Court of Appeals*

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STATE OF WEST VIRGINIA

At a regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 25th day of March, 1968, the following order was made and entered, to-wit:

EDWARD W. HOLSTINE, Plaintiff Below, *Appellee*

vs.

CHEMICAL TANK LINES, INC., a corporation, and GARLAND BRUMFIELD, Defendants Below, CHEMICAL TANK LINES, INC., a corporation, *Appellant*

Upon an appeal from and supersedeas to a judgment of the Circuit Court of Kanawha County, rendered on the 10th day of May, 1967.

On this day came J. Campbell Palmer, III, counsel for the appellant in this proceeding, and presented to the Court motion in writing with brief in support thereof, to reconsider the order entered herein on the 20th day of March, 1968 dismissing this appeal for failure to fine [sic] appeal and supersedeas bond within the time permitted by statute, or in the alternative for a stay of sixty days pending an appeal to the United States Supreme Court.

Upon consideration whereof the Court is of opinion to and doth refuse the motion to reconsider its aforesaid order and to permit a rehearing on the motions involved; and the Court is further of opinion to and doth grant the motion to stay the execution on the judgment as provided by Code, 58-5-31.

It is therefore considered and ordered that the execution on the judgment entered on March 20, 1968, be suspended for a period of ninety days from the end of this term, in order to permit the aforesaid appellant to appeal to the Supreme Court of the United States, but this order is not to take effect until the said appellant, or some person for it, shall have given before the Clerk of this Court bond with good personal security in the penalty of FIVE HUNDRED THOUSAND Dollars, conditioned according to law: all of which is ordered to be certified to the Circuit Court of Kanawha County and to the Common Pleas Court of Kanawha County. Judge Calhoun absent.

A True Copy

Attest:
*Clerk Supreme Court of Appeals*

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 9 1968
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

October Term, A. D. 1968

No. [redacted] 195

CHEMICAL TANK LINES, INC., a corporation, *Appellant*

v.

EDWARD W. HOLSTINE, *Appellee*

APPEAL FROM THE SUPREME COURT OF WEST VIRGINIA

## MOTION TO DISMISS OR AFFIRM

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IN THE

# Supreme Court of the United States

**October Term, A. D. 1967**

**No. 1533**

CHEMICAL TANK LINES, INC., a corporation, *Appellant*

v.

EDWARD W. HOLSTINE, *Appellee*

**ON APPEAL FROM THE SUPREME COURT OF WEST VIRGINIA**

## MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal, or, alternatively, to affirm the order of the West Virginia Supreme Court of Appeals below summarily on the grounds that the decision was clearly in accord with controlling constitutional principles.*

*A copy of Appellee's brief is filed with this motion and is lodged with the Clerk of this Court.

1. The facts alleged in the Jurisdictional Statement are not correct** in that:

> A. Appellant alleges (p. 7, Jurisdictional Statement) that the bond for $5,000.00 required by the order of the Circuit Court of Kanawha County, West Virginia, was "a cost bond for Appeal to the Supreme Court of Appeals for West Virginia", when, as a matter of fact, it was a suspending bond to suspend the order of

**Apology is made for the length of this motion and appendix but it is made necessary to correctly establish the facts.

said Circuit Court for a period of 60 days. Appendix, p. 3(a), for the terms of said bond.

B. Appellant alleges (p. 2 and 3, Jurisdictional Statement) that, "Following refusal by that Court (Circuit Court of Kanawha County, West Virginia) to assume jurisdiction, a Petition for Writ of Error or Appeal and also for a Writ of Supersedeas was filed in the Supreme Court of Appeals of the State of West Virginia." The petition of Appellant to the Supreme Court of Appeals was "Petition for Appeal or Writ of Error and Supersedeas." Appendix, p. 4(a)-5(a) for copy of petition showing prayer and alleged errors assigned. The order of the Supreme Court of Appeals of West Virginia recited "the appeal and supersedeas prayed for is granted." Only one bond was required. See Appendix, p. 7(a).

C. The statement in the Jurisdictional Statement (p. 19) that, "The giving of a bond for costs by Appellant on May 10, 1967, was sufficient here to act as an appeal bond, because the amount of $5,000 was adequate," is not correct for the bond of May 10, 1967, for $5,000.00 was not a bond for costs on appeal but a "suspending bond to suspend the order of the Circuit Court of May 10, 1967." (Appendix, p. 1(a) for Court order, and p. 2(a) for suspending bond).

D. It is not correct as stated in Jurisdictional Statement, p. 3, that, "An Appeal and Writ of *Supersedeas* were thereafter granted on September 11, 1967, *the latter conditioned according to law.*" (Italics ours). The *bond*, not the supersedeas, was required by the order of September

11, 1967, to be "conditioned according to law." The appeal and supersedeas were not to take effect until such bond was given by Appellant. Appendix, p. 7(a).

E. It is not correct, as stated on p. 7, Jurisdictional Statement, that, "Appellant herein contended in the trial and Appellate Courts that such a ruling was in violation of its constitutional rights under the Constitutions of both the State of West Virginia and the United States, and further that such holding constituted an unlawful burden on Interstate Commerce." (a) Nowhere in the 20 assignments of alleged error presented by Appellant to the Court of Common Pleas on November 12, 1965, and found on pages 213 to 219 of the record, is there any mention of the violation of any constitutional rights of the Appellant, either state or federal. (b) Nowhere in the 5 assignments of alleged error in Appellant's petition for an appeal to the Circuit Court of Kanawha County, West Virginia, is there any mention of the alleged violation of Appellant's constitutional rights, either state or federal. See page 2760 of the record and Appellee's Appendix, p. 9(a)-10(a). (c) Nowhere in the 10 assignments of alleged errors set out in Appellant's petition for an appeal and supersedeas filed by it in the Supreme Court of Appeals of West Virginia is there any mention of the alleged violation of Appellant's constitutional rights, either state or federal. Appendix, p. 4(a)-5(a).

F. The cases cited on page 3 of Appellant's Jurisdictional Statement do not sustain Appel-

lant's contention that it is entitled to have its appeal heard by this Court.

2. The appeal does not present a substantial federal question, for:

A. Procedural rules of a court, whether trial or appellate, to regulate and govern the orderly transaction of its business do not contravene the Fourteenth Amendment to the Constitution of the United States. Appeals are wholly matters of statute and are left to the Congress and legislatures of the various states.[1] Appeals to an appellate tribunal must conform to both applicable statutory provisions and the particular court's rules governing appeal.

3. The federal question sought to be reviewed was not timely raised, for:

A. Appellant's petition to the Supreme Court of Appeals of West Virginia for an appeal from the May 10, 1967 ruling of the Circuit Court of Kanawha County, West Virginia, presented no federal question. Appendix, p. 4(a)-5(a).

B. The said petition did not claim that the trial court had violated any of Appellant's constitutional rights. Appendix, p. 4(a)-5(a).

4. The federal question sought to be raised was not expressly passed on by the Supreme Court of Appeals of West Virginia:

A. Since the Supreme Court of Appeals of West Virginia dismissed the appeal to it for

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[1]28 U.S.C.A. Judiciary and Judicial Procedure; Michie's West Virginia Code, Volume 16, Chapter 58, Appeal and Error.

failure of Appellant to comply with the statutes of West Virginia and the Rules of the West Virginia Supreme Court governing the time within which appellant was required to file its bond on the conditional appeal allowed by the West Virginia Supreme Court in its order of September 11, 1967, the Supreme Court of Appeals has not expressly passed on any of the questions presented to it in appellant's application for appeal. Appellant's Appendix, p. 1-a.

5. The judgment of the Supreme Court of Appeals of West Virginia rests on an adequate non-federal basis, for:

A. Procedural rules of all appellate courts, including the Supreme Court of the United States, require litigants presenting grievances to conform to the practice and procedure set out in the statutes and rules of the court governing the same.[2] Accordingly, the West Virginia Supreme Court of Appeals has held that the posting of a bond within the required time is necessary to establish the court's jurisdiction. As recent as 1966, this position has been reaffirmed.[3] Also, Appellant failed to comply with the order of the Supreme Court of Appeals of West Virginia of

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[2]Deena Products Co. v. United Brick & Clay Workers of America, C.A. 6th 1952, 195 F. 2d 612. Certiorari denied. 73 S. Ct. 21, 344 U. S. 833, 97 L. ed. 640.

28 U.S.C.A. Supreme Court Rules.

28 U.S.C.A. Federal Rules of Civil Procedure.

Michie's West Virginia Code, Volume 16, Chapter 58, Appeal and Error.

[3]Scott v. Coal & Coke Railway Co., 70 W. Va. 777, 74 S. E. 992.

State v. Legg (1966), 151 W. Va. 401, 151 S. E. 2d 215.

Boggs v. Settle (1965), 150 W. Va. 330, pt. 1. syl., 145 S. E. 2d 446.

September 11, 1967. The statutory bond requirement is mandatory and jurisdictional, and cannot be waived.[4]

6. An appellate court is the final arbitrator of its rules.[5]

7. The West Virginia statutory provisions governing the conditions and time for filing bonds, when required by orders of the West Virginia Supreme Court of Appeals (Michie's West Virginia Code, Chapter 58, Article 6, Sections 14 and 16) do not violate any provision of the United States Constitution.[6]

The appeal should be dismissed for want of a substantial federal question, or, alternatively, the order appealed should be summarily affirmed as fully consonant with the United States Constitution. If the Jurisdictional Statement be deemed an application for writ of certiorari, it should be denied.

A. Federal basis for court determination cannot be predicated on a motion for rehearing, or a motion to reverse the decision of the state appellate tribunal.

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[4]4A C.J.S. Appeal & Error—Sec. 572.
Scott v. Coal & Coke Railway Co., 70 W. Va. 777, 74 S. E. 992.
Glidden v. Aetna Casualty Co. (Tex. 1956) 291 S. W. 2d 315.

[5]John v. Paullin, 58 L. ed 381; 231 U. S. 583 (1913).
28 U.S.C.A. Supreme Court Rules.
28 U.S.C.A. Federal Rules of Civil Procedure.

[6]Deena Products Co. v. United Brick & Clay Workers of America, C. A. 6th 1952, 195 F. 2d 612. Certiorari denied. 73 S. Ct. 21, 344 U. S. 833, 97 L. ed. 640.
Montgomery Bldg. & Const. Trades Council v. Ledbetter Erection Co., Ala. 1952, 73 S. Ct. 196, 344 U. S. 178, 97 L. ed. 204.
Hartford Life Ins. Co. v. Johnson (Mo. 1919), 39 S. Ct. 336, 249 U. S. 490, 63 L. ed. 722.

B. If so, every losing litigant can by such motion, after a ruling by the state appellate court, present a justiciable federal basis on claiming his federal constitutional rights were violated, and completely inundate this Court by such unjustified appeals.

## CONCLUSION

For the foregoing reasons, the appeal should be dismissed.

Respectfully submitted,

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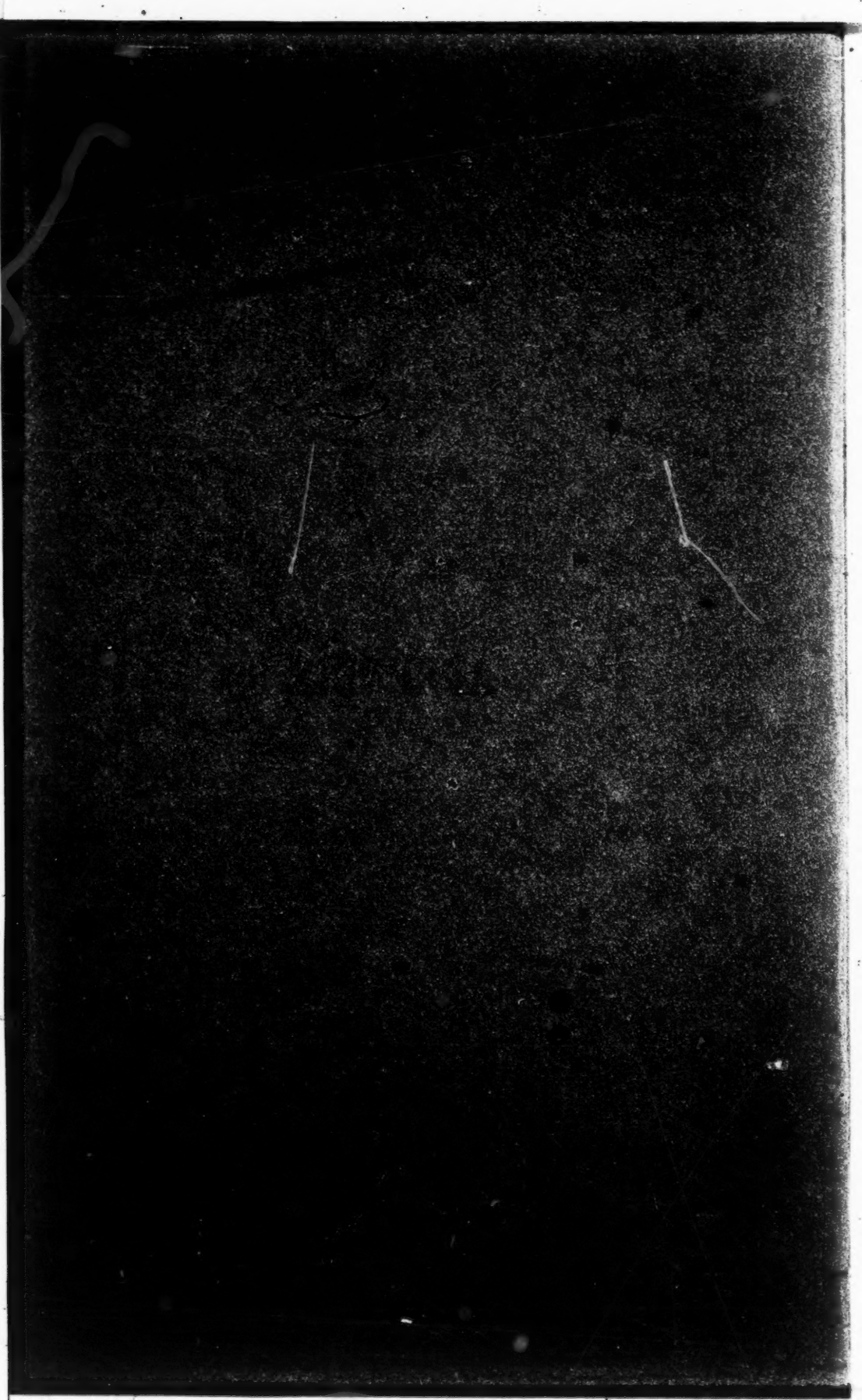

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This 10th day of May, 1967, came the plaintiff by Stanley E. Preiser and John S. Haight, his attorneys, and came Chemical Tank Lines, Inc., a corporation, by J. Campbell Palmer III, its attorney.

The Court having maturely considered the Petition of Chemical Tank Lines, Inc., a corporation, for a Writ of Error or an Appeal, is of opinion to and doth hereby refuse to grant said Writ of Error or an Appeal upon the grounds that the judgment of the Court of Common Pleas was plainly right, for reasons set out in the Court's letter memorandum of opinion dated March 2, 1967, a copy of which is ORDERED to be filed and made a part of this Order.

And the defendant, Chemical Tank Lines, Inc., a corporation, having advised the Court and counsel of its desires and intentions to seek a Petition for an Appeal or Writ of Error from the Supreme Court of Appeals, did move the Court that a stay of execution be granted for a period of 120 days.

And the Court having maturely considered of said motion, does hereby ADJUDGE and ORDER that a stay of execution be granted the defendant for a period of sixty (60) days from the entry of this Order within which time the said Chemical Tank Lines, Inc. may apply to the Supreme Court of Appeals for an Appeal or Writ of Error; provided said Chemical Tank Lines, Inc., a corporation, does give proper and lawful a security for costs by giving to the Clerk of this Court a bond in the amount of $5,000.00, properly executed and with good and lawful security therefor.

And the defendant having heretofore tendered for filing its Petition for Appeal or Writ of Error, Second

Application, together with accompanying Brief which was not acted upon by the Court, does again tender its Petition for Appeal or Writ of Error, Second Application, together with accompanying Brief, which said Petition is by the Court ORDERED refused.

ORDER

ENTER: /s/ FRANK L. TAYLOR
*Judge*

APPROVED:

/s/ JOHN S. HAIGHT
*Counsel for Plaintiff*

/s/ J. C. PALMER, III
*Counsel for Defendant*

STATE OF WEST VIRGINIA,

At a Circuit Court for Kanawha County held at the Court House thereof on the 10th day of May, 1967.

**SUSPENDING BOND**

TRESPASS ON THE CASE NO. 9282 C. P. Law

KNOW ALL MEN BY THESE PRESENTS:

That we, J. Campbell Palmer, III, Responsible person for Chemical Tank Lines, Inc., Principal and Seaboard Surety Company, Surety, are held and firmly bound unto the State of West Virginia and Edward W. Holstine, in the just and full sum of Five Thousand Dollars ($5,000.00) to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally and firmly by these presents, sealed with our seals and dated this 10th day of May, 1967.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH

That Whereas, the above Chemical Tank Lines, Inc., a corporation desire to present a petition to the Supreme Court of Appeals of the State of West Virginia, for an Appeal or Writ of Error to a Judgment of the Circuit Court of Kanawha County, rendered on the 10th day of May, 1967, wherein Edward W. Holstine was the Plaintiff and Chemical Tank Lines, Inc., a corporation and Garland Brumfield was Defendants.

And the said Circuit Court has made an order suspending said Judgment for the space of Sixty (60) days; when the said Chemical Tank Lines, Inc., a corporation, shall give bond before the Clerk of said Court, in the penalty of $5,000.00 conditioned as provided by law in such cases;

Now therefore if the said Chemical Tank Lines, Inc., a corporation, shall well and truly pay all such damages as any person may sustain by reason of said suspension in case an Appeal or Writ of Error to such Judgment shall not be allowed and be effectual within the above specified time, then this obligation to be void; else to remain in full force.

/s/ J. CAMPBELL PALMER, III,
Attorney SEAL
J. CAMPBELL PALMER, III
Responsible Person for Chemical Tank Lines, Inc., a corporation, Principal SEAL
SEABOARD SURETY CO.,
Surety SEAL
/s/ By: R. E. CARSON SEAL
Attorney in fact

Signed, sealed and acknowledged before me and approved by me this 10th day of May, 1967.

/s/ LEWIS A. HATCHER, *Clerk*
Circuit Court of Kanawha
County, West Virginia

IN THE SUPREME COURT OF APPEALS
of
WEST VIRGINIA

EDWARD W. HOLSTINE,
*Appellee, Plaintiff Below*
*v.*
CHEMICAL TANK LINES, INC.,
*a corporation,*
*Appellant, Defendant Below.*

**PETITION FOR APPEAL OR WRIT OF ERROR AND SUPERSEDEAS**

TO THE HONORABLE JUDGES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

* * * *

ERRORS COMPLAINED OF

(1) The trial court erred in refusing to direct a verdict for the defendant, Chemical, or alternatively, in refusing to grant the defendant's motion for judgment, made pursuant to and within the time limits of R. C. P. 50 (b), and was sustained by the Circuit Court.

(2) In the alternative, the Courts below erred in refusing to grant defendant's motion to set aside the verdict of the jury and award it a new trial.

(3) The courts below erred in entering and sustaining judgment for the plaintiff against the defendant in the sum of $350,000.00.

(4) The Court erred in giving plaintiff's instruction No. 4 (T-1964), instructing the jury, as a matter of law, that the plaintiff, Holstine, was not an employee of Chemical and, therefore, the fact that Chemical was a subscriber to the West Virginia Workmen's Compensation Fund was no defense to the action.

(5) The trial court erred in giving plaintiff's instruction No. 12 as amended (T-1977, T-2066), which the trial court stated (T-1981) was tantamount to directing a verdict for the plaintiff, in that it held that the negligence of an employee of an independent contractor was not only attributable to, but was the actual negligence of the contractee. This erroneous action was presumptively sustained by the Circuit Court.

(6) The trial court erred in refusing all of the defendant's instructions (T-2000-2048), except an instruction No. 1 (T-2000) defining negligence, and an instruction No. 11 (T-2017) on the variance between physical facts and actual testimony, instruction No. 12 on credibility (T-2018), and instruction No. 33 (T-2053) that if the defendant was not guilty of negligence which proximately contributed to causing the accident, it was not liable. The Circuit Court erroneously approved.

(7) The trial court erred in refusing to grant the motions made by the defendant (T-2050, 2065) clarifying the positions of law.

(8) The trial court erred in its rulings of law on the admission and exclusion of evidence during the trial.

(9) The trial court grieveously erred in permitting counsel for the plaintiff to prepare and display before the jury during his closing argument a large written

chart of purported money damages, erroneous in fact, prejudicial in nature, and unsupported by competent evidence, and in refusing defendant's motion for a mistrial because of its thereof (T-2209). The Circuit Court erred in sustaining this.

(10) The amount of the verdict was grossly excessive, and was arrived at by prejudice, error and mistake.

## PRAYER

WHEREFORE, Chemical Tank Lines, Inc., the defendant below, appellant herein, prays the Court that it be awarded an Appeal, if such be proper, or a Writ of Error, if such be proper, and in either event, be granted Supersedeas to the judgment below, and that this Court, after such award, review the case and grant defendant's motion for judgment under R. C. P. 50 (b), or again in the alternative, set aside the verdict of the jury and award to it a new trial.

Respectfully submitted,

J. CAMPBELL PALMER, III
*Attorney for Appellant*
300 Security Building
Charleston, West Virginia

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 11th day of September, 1967, the following order was made and entered, to wit:

Edward W. Holstine, Plaintiff Below, Appellee

vs. Trespass on the Case No. 9282

Chemical Tank Lines, Inc., a corporation, and Garland Brumfield, Defendants Below,

Chemical Tank Lines, Inc., a corporation, Appellant

On a former day, to-wit, June 27, 1967, came the petitioner, Chemical Tank Lines, Inc., a corporation, by J. Campbell Palmer, III, its attorney, and presented to the Court its petition praying for an appeal from and supersedeas to a judgment of the Circuit Court of Kanawha County rendered in this action on the 10th day of May, 1967, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the appeal and supersedeas prayed for is granted, but it is not to take effect until the petitioner, or some person for it, shall have given before the Clerk of the Circuit Court of Kanawha County bond with good personal security in the penalty of FIVE HUNDRED THOUSAND Dollars, conditioned according to law.

A True Copy

Attest: KENNETH E. HINES
*Clerk Supreme Court of Appeals*

IN THE SUPREME COURT OF APPEALS
of
WEST VIRGINIA

EDWARD W. HOLSTINE,
*Plaintiff, Appellee,*
v. No. 12693
CHEMICAL TANK LINES, INC.,
*a corporation,*
*Defendant, Appellant.*

**BRIEF**

* * * *

One more matter of estoppel. On November 3, 1967, Mr. Preiser wrote Mr. Palmer that he was going to

file his motion to dismiss the appeal because it was untimely granted, and served notice on November 3 of his specific intention so to do.

Nothing was said as to why such grounds were to be made, although naturally, Mr. Palmer was generally advised in the premises. Had that motion been sustained by this Court, then the filing of the supersedeas bond and the $25,000 premium therefor would have been a useless gesture on the part of Appellant. We submit that the time within which the supersedeas bond could be entered into should and must be automatically extended until such time as the Court has disposed of that motion, because otherwise, the Appellant would have been required to do a useless and a very expensive thing.

We think it would ill become the Appellee to state that they had not filed such motion in good faith, as we are sure that they must have done, but if such motion were filed in good faith, then Appellee's counsel must have realized that if they were successful, there was no use for the Appellant to spend the $25,000 premium for the bond, as the bond would be useless.

Therefore, the filing of the Motion to Dismiss the Appeal as improvidently awarded, being construed to have been made in good faith, from the time the notice thereof was given to counsel for Appellant until this Court acts on the matter, there should and must be a suspension of the running of the time within which to file the supersedeas bond; otherwise, the Appellant, if the Court does sustain that good faith motion, would have been required to make an expenditure of a large sum of money; to-wit, $25,000, without any possible benefit therefrom. Since this action was performed by counsel for the Appellee, that is the Motion

made, then we think this Court should consider that the time for the filing of the supersedeas bond should be extended until that matter has been finally disposed of.

* * * *

IN THE CIRCUIT COURT
OF KANAWHA COUNTY, WEST VIRGINIA

EDWARD W. HOLSTINE,
*Plaintiff,*

v.

CHEMICAL TANK LINES, INC.,
a corporation,
*Defendant.*

Upon Appeal
Trespass on the
Case No. 9282

**PETITION FOR WRIT OF ERROR OR APPEAL**

To The Honorable Frank L. Taylor,
Judge of Said Court:

* * * *

ISSUES ARISING

The first issue before this Court will be whether this defendant was so protected by reason of it being a fully paid-up subscriber to the Workmen's Compensation Fund that judgment should be rendered in its behalf.

The second issue is whether the amount of the verdict is, supported by the evidence, so excessive as to cause this Court to set it aside for such reason.

Thirdly, the defendant will contend that there was, in fact, a directed verdict for the plaintiff so that the jury did not actually decide the issues raised at trial; hence, we will take the position throughout this appeal

that this Appellate Court should consider all of the facts, evidence and circumstances favorable to the defendant to determine if there should have been such a directed verdict for the plaintiff.

Next, we are contending that the issues were such that even we are not successful with all other points of error, the facts were in such dispute that they should have been submitted for jury determination and were not matters so clearly undisputed as to cause the court below to make decisions, as a matter of law, on all issues involved.

Lastly, errors in trial of case, which should be ruled upon if a new trial only were granted, so as not to be repeated at a subsequent trial.

* * * *

## APPLICABLE SECTIONS OF THE CODE OF WEST VIRGINIA TO THIS APPEAL

Michie's West Virginia Code, Volume 16, Chapter 58, Article 5,

Section 4: TIME FOR APPEAL OR WRIT OF ERROR; NOTICE OF INTENT TO FILE PETITION IN CRIMINAL CASES TO BE FILED WITH CLERK STATING GROUNDS.

"No petition shall be presented for an appeal from, or writ of error or supersedeas to, any judgment, decree or order, whether the State be a party thereto or not, which shall have been rendered or made more than eight months before such petition is presented.

"In criminal cases no petition for appeal or writ of error shall be presented unless a notice of intent to file such petition shall have been filed with the Clerk

of the court in which the judgment or order was entered within sixty days after such judgment or order was entered. The notice shall fairly state the grounds for the petition without restricting the right to assign additional grounds in the petition."

Section 5: STAY OF PROCEEDINGS; SUPERSEDEAS BOND.

"At the instance of any person who desires to present such petition, the court, in which the judgment, decree or order is, may, during the term at which it is rendered or made, or the judge of such court may, within twenty days after such term is ended, upon notice in writing to the opposite party (in either case the court or the judge exercising a discretion), make an order suspending the execution of such judgment, decree or order, for a reasonable time to be specified in such order, when such person shall give bond before the clerk of such court, in such penalty as the court or judge may require, with a condition reciting such judgment, decree or order, and the intention of such person to present such petition, and providing for the payment of all such damages as any person may sustain by reason of such suspension in case supersedeas to such judgment, decree or order should not be allowed and be effectual within the time so specified."

Section 10: ALLOWANCE OF APPEAL OR WRIT OF ERROR OR SUPERSEDEAS; STAY OF PROCEEDINGS.

"The court or judge to whom a petition is duly presented, if of opinion that the decision complained of ought to be reviewed, may allow an appeal, writ of error or supersedeas, and may stay proceedings either in whole or in part."

Section 14: APPEAL BOND GENERALLY.

"Except when an appeal, writ of error or supersedeas is proper to protect the estate of a decedent, convict or insane person, the same shall not take effect until bond is given by the appellants or petitioners, or one of them, or some other person, in a penalty to be fixed by the court or judge by or in which the appeal, writ of error or supersedeas is allowed or entered with condition: If a supersedeas be awarded, to abide by and perform the judgment, decree or order of affirmance, and to pay to the opposite party, and to any person injured all such costs and damages as they, or either of them, may incur or sustain by reason of said appeal, in case such judgment, decree or order, or such part, be affirmed, or the appeal, writ of error or supersedeas be dismissed, and also, to pay all damages, costs and fees, which may be awarded against or incurred by the appellant or petitioners; * * * *."

Section 16: TIME FOR PRESENTING RECORD AND GIVING BOND.

"No process shall issue upon any appeal, writ of error or supersedeas allowed from or to a final judgment, decree or order, if, when the record is delivered to the clerk of the appellate court, eight months shall have elapsed since the date of such final judgment, decree or order; but the appeal, writ of error or supersedeas shall be dismissed whenever it appears that eight months have elapsed since such date before the record is delivered to such clerk, or that two months have elapsed since the date when the appeal, writ of error or supersedeas was granted before such bond is given as is required to be given before the appeal, writ of error or supersedeas takes effect."

## APPLICABLE SECTIONS OF THE RULES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA TO THIS APPEAL

Michie's West Virginia Code, Volume 1, Rule III, Section 3:

BOND—DISMISSAL FOR FAILURE TO EXECUTE.

"If the appellant or plaintiff in error, except in criminal cases or other cases in which no bond is required, shall fail to execute bond before the circuit clerk within two months after allowance of the appeal or writ of error in this court, his appeal, or writ of error shall be dismissed. The procedure for such dismissal shall be as provided in Section 2 of Rule IV."

AGREEMENT OF COUNSEL.

"All agreements of counsel in regard to any case or matter pending in court shall be reduced to writing, signed by counsel and delivered to the clerk."

LIBRARY
FME COURT, U. S.

FILED
JUL 9 1968
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

**October Term, A. D. 1967**

**No. [redacted] 15**

CHEMICAL TANK LINES, INC., a corporation, *Appellant*

v.

EDWARD W. HOLSTINE, *Appellee*

**ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**BRIEF OF APPELLEE IN SUPPORT OF MOTION TO DISMISS THE APPEAL AND TO AFFIRM THE JUDGMENT BELOW.**

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IN THE

# Supreme Court of the United States

October Term, A. D. 1967

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No. 1533

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CHEMICAL TANK LINES, INC., a corporation, *Appellant*

v.

EDWARD W. HOLSTINE, *Appellee*

---

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

---

## BRIEF OF APPELLEE IN SUPPORT OF MOTION TO DISMISS THE APPEAL AND TO AFFIRM THE JUDGMENT BELOW.

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(Appendix herein referred to is Appendix to Motion to Dismiss)

### CHRONOLOGICAL STATEMENT OF FACTS

On November 12, 1965, the Appellee, Edward W. Holstine, obtained a judgment on a jury verdict against Appellant, Chemical Tank Lines, Inc., a corporation, in the Court of Common Pleas of Kanawha County, West Virginia, for $350,000.00. The Appellant made certain motions for a judgment under West Virginia Civil Rules of Procedure, Rule 50-B, which is equivalent to a motion *non obstante veredicto*, and a motion to set aside the verdict and grant it a new trial, both of which were overruled by the trial court, and a judgment was entered on the verdict on the 12th day of November, 1965. Thereafter, the Appellant

filed its petition with supporting brief in the Circuit Court of Kanawha County, West Virginia, asking for a writ of error to or appeal from the judgment of the Court of Common Pleas of Kanawha County, West Virginia. (An appeal or writ of error must be sought in the Circuit Court of Kanawha County from the Court of Common Pleas of Kanawha County, West Virginia, before application for writ of error or appeal can be made in the Supreme Court of West Virginia). On May 10, 1967, the Circuit Court of Kanawha County, West Virginia, after mature consideration, rendered its written opinion and refused to grant Appellant the writ of error or appeal sought by it for the reason that the judgment complained of was "plainly right", but on Appellant's motion, granted it a stay of execution to the judgment of the Court of Common Pleas for a period of 60 days to allow the Appellant to file its application in the Supreme Court of Appeals of West Virginia for an appeal or writ of error, provided, and on condition that the Appellant execute and file a suspending bond with the Clerk of the Circuit Court in the penalty of $5,000.00, conditioned to pay "all such damages as any person may sustain by reason of said suspension in case an appeal or writ of error to such judgment shall not be allowed and be effective within the specified time." This was not a bond to pay Appellee's costs in the Supreme Court, for the Appellant, on its application in the Supreme Court, might not be granted an appeal or writ of error. A copy of said order of the Circuit Court of Kanawha County, West Virginia, dated May 10, 1967, is found in Appendix, p. 1(a). A copy of the bond required by such order is found in Appendix, p. 2(a)-3(a).

Thereafter, on June 27, 1967, Appellant presented to the Supreme Court of Appeals of West Virginia its petition praying for an appeal from and supersedeas to the judgment of the Circuit Court of Kanawha County, West Virginia, rendered on the 10th day of May, 1967. The petition is styled "Petition for Appeal or Writ of Error, and Supersedeas." The prayer of the petition asks that "it be awarded an Appeal, if such be proper, or a Writ of Error, if such be proper, and in either event, be granted a Supersedeas to the judgment below." Pertinent parts of the petition are found in Appendix, p. 6(a).

Thereafter, on September 11, 1967, and after inspecting the petition and argument in support thereof, the Supreme Court of Appeals granted the appeal and supersedeas prayed for, but it was not to take effect until the petitioner had given bond before the Clerk of the Circuit Court of Kanawha County in the penalty of $500,000.00, conditioned according to law. A full copy of this order is contained in Appendix, p. 6(a)-7(a). The statute of West Virginia, Chapter 58, Article 5, Section 16, and the Rules of the Supreme Court of Appeals of West Virginia, Rule III, Section 3, both require that the bond must be given within two months from the date the appeal and supersedeas is granted or the appeal shall be dismissed. Both under the statute and the Supreme Court Rule the dismissal of the appeal is mandatory if the bond required by the order is not given within the two months period. (November 11, 1967, would be the last day of the two months period when bond could be given). No bond was given during that period. The condition of this bond is found in Chapter 58,

Article 5, Section 14, of the Code of West Virginia. Appendix, p. 12(a).

On November 3, 1967, counsel for Appellee served notice on counsel for the Appellant that on November 14, 1967, a motion would be filed in the Supreme Court of Appeals of West Virginia to dismiss the appeal previously awarded the Appellant as having been improvidently awarded on September 11, 1967, on the grounds that the Appellant did not file its petition for writ of error or appeal in the Supreme Court of Appeals of West Virginia within the time allowed by law, and that the Appellant did not have its bill of exceptions or certificates in lieu thereof properly filed within the time provided by law, and, therefore, the Court was without jurisdiction to grant said appeal or writ of error. On November 14, 1967, pursuant to his notice of November 3, 1967 to Appellant, Appellee filed his motion to dismiss the appeal as having been improvidently awarded on the grounds aforesaid and filed his brief in support thereof. On the same date, the Appellant filed its brief in opposition to that motion.

On November 28, 1967, Appellant had not given its appeal bond as required by the order of the Supreme Court of Appeals of West Virginia of September 11, 1967, and by the statute of West Virginia, Chapter 58, Article 5, Section 16, and the Rules of Practice of the Supreme Court, Rule III, Section 3. The Appellee, on that date, filed his notice and motion to dismiss the appeal and supersedeas previously allowed the Appellant by the Supreme Court of Appeals of West Virginia by its order of September 11, 1967, for the failure of the Appellant to give its bond in

the penalty of $500,000.00 within the two months period as required by said order, said statute and Rule of the Supreme Court. On November 29, 1967, the Appellant filed with the Circuit Court of Kanawha County, West Virginia, its bond in the penalty of $500,000.00, which was 18 days after it was required to be filed by the statute, Rule of the Supreme Court and order of September 11, 1967 of the Supreme Court.

With extensive briefs having been filed, counsel for Appellant and Appellee, on March 19, 1968, orally argued both motions of Appellee, (1) to dismiss the appeal on the grounds that the Appellant did not file its application for appeal in the Supreme Court within the time allowed by law, and did not have its bill of exceptions or certificates in lieu thereof properly filed within the time provided by law, and, (2) to dismiss the appeal on the ground that the Appellant had not filed its bond required by the Court's order of September 11, 1967, within the two months period required by the statute and the Rules of the Court. Time was allowed both counsel for full argument on both these motions to dismiss the appeal as improvidently awarded.

On March 20, 1968, the Supreme Court of Appeals sustained the motion of the Appellee filed on November 28, 1967, to dismiss the appeal and supersedeas on the ground that the Appellant had not given the bond as fixed by the Supreme Court in its order of September 11, 1967, within the two months period as required by statute and the Rules of Practice of the Supreme Court, but the Supreme Court did not, because it was unnecessary to, consider any of the other motions of

the Appellee theretofore filed to dismiss the appeal and supersedeas as improvidently awarded, which order is in Appendix A, page 1-a, Jurisdictional Statement.

**APPELLEE'S REPLY TO APPELLANT'S STATEMENTS THAT THE "QUESTIONS ARE SUBSTANTIAL"**

It is asserted on page 15 of Appellant's brief that "Article 8, Section 1 of the Constitution of West Virginia provides that judicial powers of the State shall be vested in the Supreme Court of Appeals to consider a case in which it had already granted the right to have it so determined by the awarding of the Writ of Appeal". Article VIII, Section 1 of the Constitution* makes no such provision. It is as follows:

> "1. The judicial power of the State shall be vested in a supreme court of appeals, in circuit courts and the judges thereof, in such inferior tribunals as are herein authorized and in justices of the peace."

The scope of the jurisdiction of the Supreme Court of Appeals of West Virginia is provided in Article VIII, Section 3 of the Constitution*:

> "3. It shall have original jurisdiction in cases of habeas corpus, mandamus, and prohibition. It shall have appellate jurisdiction in civil cases where the matter in controversy, exclusive of costs, is of greater value or amount than one hundred dollars; in controversies concerning the title or boundaries of land, the probate of wills, the appointment or qualification of a personal representative, guardian, committee or curator, or concerning a mill, road, way, ferry or landing; or the right of a corporation or county to levy tolls or taxes; and, also, in case of quo war-

*Michie's West Virginia Code, Volume 1.

ranto, habeas corpus, mandamus, certiorari, and prohibition, and in cases involving freedom or the constitutionality of a law."

The West Virginia statute (Code 58-5-16) takes nothing away from either Section 1 or Section 3 of Article VIII of the West Virginia Constitution*. It merely provides the time in which an applicant may present his appeal and the time in which he may give any bond required. Earlier statutes allowed longer periods of time. The case of *N &W Railway* v. *County Court*, 123 W. Va. 461, 15 S. E. 2d, 574, sustains the position of Appellee and not of Appellant.

Appellant's contention in this appeal as set out on pages 18 and 19 of its Jurisdictional Statement is based upon the alleged premise that the appeal and supersedeas granted by the Supreme Court of West Virginia on September 11, 1967, were two separate and distinct things—one, the appeal, and the other a supersedeas; that the bond given in the Circuit Court of Kanawha County, West Virginia, on May 10, 1967, for $5,000.00 was to act as an appeal bond in the Supreme Court for costs in the Supreme Court appeal. The recitals in the order of the Supreme Court of September 11, 1967, designated that the appeal was not separate from the writ of supersedeas, but that they were one writ and required one bond. See Appendix, p. 6(a)-7(a). The recital in the order of the Circuit Court of May 10, 1967, designated a stay of execution bond to stay the execution on its order, and the bond actually given in the penalty of $5,000.00 was conditioned to pay "all such damages as any

*Michie's West Virginia Code, Volume 1.

person may sustain by reason of said suspension in case an appeal or writ of error to such judgment shall not be allowed and be effective within the specified time." A full copy of this bond is found in Appendix, p. 2(a)-3(a). The Supreme Court fixes the condition and penalties of the bonds required by it, and the Circuit Court of Kanawha County fixed the conditions and penalties of the bonds required by it. They are separate courts.

Appellant knew of the condition of the provisions of the order of the Circuit Court of Kanawha County of May 10, 1967, for its counsel signed it. It likewise knew the condition of the bond executed on May 10, 1967, in the penalty of $5,000.00, for its counsel signed the bond for it. These undisputed facts remove the basis upon which the Appellant relies for this appeal.

The Appellant, on page 19 of Appellant's Jurisdictional Statement, states that "The giving of a bond for costs by Appellant on May 10, 1967, was sufficient here to act as an appeal bond, because the amount of $5,000 was adequate." The condition of that bond was to do no more and no less than its terms, and only required the payment of damages as any person might sustain by reason of the suspension of the Court's order in case an appeal or writ of error was not allowed. The instant the appeal was allowed by the Supreme Court, the conditions of that bond were fulfilled and by its very terms became null and void and there could be no liability thereon. Without any bond having been given, whether for appeal, for costs, or appeal with supersedeas, within the time provided by the statute and Rules of the Supreme Court, on motion, that appeal would be dismissed and the Ap-

pellee would have no action on the $5,000.00 bond even if the appeal was for appeal only and without supersedeas. If the judgment of the court below was affirmed and the Appellee was awarded his costs, he would have no action on the $5,000.00 bond given in the Circuit Court on May 10, 1967, for that bond was not so conditioned.

The appeal to this Court under 28 U.S.C.A. 1257(2) then resolves itself as to whether a party litigant, regardless of the questions involved, whether Federal or State, or the Constitution of either, can complain to this Court if he has not complied with the statutes and rules of the state court, both as to the time within which he has to make his application to the state court for an appeal, and the time within which he has to give any bond required by the state court. The Supreme Court of the United States, as well as Circuit Courts of Appeal, has dismissed appeals, after the appeal has been granted, for the failure of the appellant to give the bond within the required time, even though an appeal to the Circuit Court of Appeals from a District Court is a matter of right if done within the time permitted, and no Federal Constitutional provision is violated. See, for example, *Killian* v. *Clark*, 111 U. S. 776 (1884).

The Supreme Court of the United States in *John* v. *Paullin*, 231 U. S. 583, 58 L. ed. 381, held, syllabus 2:

> "The state laws and practice relative to the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise, are no less applicable when Federal rights are in con-

troversy than when the case turns entirely upon questions of local or general law."

In the body of the opinion, it is stated (L. ed., page 382):

> "As the supreme court of the state did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the state, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. (Citing statutes and cases). Certainly no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision.
>
> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon question of local or general law." (Citing numerous Supreme Court decisions).

In order to perfect the appeal, the bond or undertaking must be filed within the time limited by statute, court rule, or court order. In Volume 4A, C. J. S., Appeal & Error, Section 565, it is stated:

> "In order to perfect the appeal, as a general rule the bond or undertaking must be filed within the time prescribed by statute or rule of court,

> or fixed by the order of the court granting the appeal, or within the time fixed for perfecting the appeal; and if it is not filed in time the appeal will be dismissed, * * *."

Numerous cases from many states of the Union are cited in support of this statement. Statutory requirement is mandatory and jurisdictional, and cannot be waived. 4A, *C. J. S.*, 572.

The Supreme Court of West Virginia has held the provisions of Chapter 58, Article 5, Section 16, as to the time in which the appeal is to be made and the time within which the bond is to be given to be mandatory and are conditioned upon which any appeal is to be awarded and, therefore, jurisdictional.

In *Scott* v. *Coal & Coke Railway Co.*, 70 W. Va. 777, 74 S. E. 992 (1912), the syllabus of which held, as is stated in the syllabus:

"APPEAL AND ERROR—Dismissal—Failure to Perfect Proceedings.

> "Failure to perfect an appeal, writ of error or *supersedeas* by giving the bond required by law and the order of the court or judge, awarding it, within one year and two months from the date of the judgment, decree or order involved, makes it the mandatory duty of the appellate court, under section 17 of chapter 135 of the Code, to dismiss the appeal, writ of error or *supersedeas*, although the bond has been given after the expiration of such period."

The only difference between the statute under which that case was decided and the present statute is the

change of the time limit. Whether the bond is a supersedeas, appeal or cost bond, the present Code of West Virginia (Chapter 58, Article 5 Sections 14 and 16) provides for an appeal bond, and the Court of September 11, 1967, directed the giving of such bond within two months of September 11, 1967, the date the appeal was awarded, and the failure to do so deprives the Supreme Court of its jurisdiction to proceed further with the appeal.

A bond was given in the *Scott* case, but it was given after the appeal period expired and the Court dismissed the appeal because the bond, although in fact given, was given after the expiration of the time to file it. The Court stated on page 779 of W. Va. Reports and page 992 S. E. Reporter:

> "Strictly speaking, no appeal, writ of error or *supersedeas* exists, until the bond is given, in those cases in which bond is required. The statute says it shall not take effect until after the bond shall have been given. * * *. The plain design of the two sections here involved is to require the petition to be presented within one year from the date of the judgment, decree or order and allow two months additional time for performance of all additional things requisite to the transfer of the cause into the supreme court."

*Scott* v. *Coal & Coke Railway Co.* was approved in *State* v. *Legg*, 151 W. Va. 401, 151 S. E. 2d 215 (1966).

In *Casanova* v. *Kreusch*, 21 W. Va. 720 (1883), the Court held:

> "A writ of error and *supersedeas* having been dismissed because of the failure of the

> plaintiff in error to give a new bond with good and sufficient security, the sureties in the first bond being insolvent, the plaintiff in error cannot after such dismission of his writ of error be awarded a writ of error without *supersedeas* on giving the bond required by law, and if such writ of error has been granted it will be dismissed as improvidently awarded."

In that case the sureties on the supersedeas bond having become insolvent, and this fact being called to the Court's attention, on appellee's motion, the Court required the appellant to furnish a new bond with good security and ordered the plaintiff in error to execute such bond within sixty days before the trial court, and on its failure to do so, the writ of error and supersedeas theretofore awarded should stand dismissed from and after the expiration of the sixty day period. The plaintiff in error then moved the Court to modify its order so as to allow him a writ of error only without supersedeas, and this the Court refused to do, and the appeal was dismissed. The plaintiff in error then applied for a new writ of error but without supersedeas, which was granted, and fixed the bond for costs only. Appellee moved the Court to dismiss the new appeal as improvidently awarded, which was done.

Where an appeal has been granted on an application filed after the statutory time, the appeal, although granted by the Court, will be dismissed as improvidently awarded on motion of the appellee.*

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*Sothen v. Continental Assur. Co., 147 W. Va. 458, 128 S. E. 2d 458 (1962); Gaymont Fuel Co. v. Price, 138 W. Va. 930, 79 S. E. 2d 96 (1953).

The Commonwealth of Virginia follows the same general rule.

In Volume 1-B of Michie's Jurisprudence, Virginia and West Virginia (1967), under the heading "Appeal and Error," it is stated in Section 147:

> "The statutory requirements for appeal bonds have always been construed as mandatory. And failure to substantially comply with the statutory requirements applicable to appeal bonds constitutes a jurisdictional defect which cannot be corrected after the expiration of the time within which an appeal may be taken. Hence, the failure to give the required bond will result in the dismissal of the appeal, should the appellee move therefor."

Numerous cases, statutes and rules are cited in support of this statement.**

## APPELLEE'S REPLY TO APPELLANT'S JURISDICTIONAL STATEMENT

We cannot accept as factual the statement of Appellant in its Jurisdictional Statement. The Supreme Court of Appeals of West Virginia on September 11, 1967, granted the Appellant an appeal and super-

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**Covington Virginian v. Woods, 182 Va. 538, 29 S. E. 2d 406 (1944); Ness v. Manuel, 187 Va. 209, 46 S. E. 2d 331 (1948); Parker v. Prince William County, 198 Va. 231, 93 S. E. 2d 136 (1956); Richardson v. Shank, 155 Va. 240, 154 S. E. 542 (1930); Smith v. Jewell Ridge Coal Corp., 203 Va. 499, 125 S. E. 2d 175 (1962); See § 8-489, Code of Virginia (1950); § 58-5-16, W. Va. Code; Rule 5:1, § 11, Sup. Ct. App. (Va.); Rules III, § 3, IV, § 13, Sup. Ct. App. (W. Va.); Phelps, Handbook of Virginia Rules of Appellate Procedure 133 (1964).

sedeas, which was one writ and not two as Appellant contends, but it was not to take effect until a bond was given by Appellant in the penalty of $500,000.00, and required the execution of that bond within two months from that date as required by Chapter 58, Article 5, Section 16, of Michie's Code of West Virginia, which provides as follows:

> "No process shall issue upon any appeal, writ of error or supersedeas allowed from or to a final judgment, decree or order, if, when the record is delivered to the clerk of the appellate court, eight months shall have elapsed since the date of such final judgment, decree or order; but the appeal, writ of error or supersedeas shall be dismissed whenever it appears that eight months have elapsed since such date before the record is delivered to such clerk, or that two months have elapsed since the date when the appeal, writ of error or supersedeas was granted before such bond is given as is required to be given before the appeal, writ of error or supersedeas takes effect."

And conditioned as required by Chapter 58, Article 5, Section 14, of the Code of West Virginia, to "abide by and perform the judgment * * * and to pay to the opposite party, and to any person injured all such costs and damages as they, or either of them, may incur or sustain by reason of said appeal, in case such judgment * * *, or such part, be affirmed, or the appeal * * * or supersedeas be dismissed, and also, to pay all damages, costs and fees, which may be awarded against or incurred by the appellant * * *."

The Appellant in its Jurisdictional Statement refers to the $500,000.00 bond as required by the Court to

be given by Appellant as a "supersedeas bond." The bond required by the Supreme Court of Appeals to be given was the one required by Chapter 58, Article 5, Section 14, of the Code of West Virginia, which was a combination appeal and supersedeas bond. The requirement was that one bond be given, not two bonds. But no bond was given by Appellant within the two months period required by Chapter 58, Article 5, Section 16, of the Code of West Virginia, or Rule III, Section 3, of the Rules of the Supreme Court of West Virginia.

## APPELLEE'S REPLY TO QUESTIONS PRESENTED

1. Appellant again undertakes to assert that it was granted an appeal by the Supreme Court of Appeals of West Virginia, and having been granted an appeal, it was further granted a writ of supersedeas, when, as a matter of fact, as shown by the Court's order, Appellant was granted a conditional appeal and supersedeas, which was on condition that it, the appeal and supersedeas, jointly, not separately, was not to take effect until Appellant gave a bond with the Circuit Court of Kanawha County in the penalty of $500,000.00, conditioned according to law. The specific language of the Court order of September 11, 1967, is as follows: "(T)he appeal and supersedeas prayed for is granted, but it is not to take effect until the petitioner, or some person for it, shall have given before the Clerk of the Circuit Court of Kanawha County bond with good personal security in the penalty of FIVE HUNDRED THOUSAND Dollars, conditioned according to law." The word "it" in the Court's order refers to the appeal and supersedeas prayed

for. The order does not use the word "they", meaning appeal and supersedeas. There was but one writ asked for and one writ granted and one bond required and it was not given within the statutory time required by Chapter 58, Article 5, Section 16, of the Code of West Virginia, and the Rules of the Supreme Court of West Virginia, Rule III, Section 3. No appeal existed until the bond was given.

2. Appellant's statement under 2 that there was an agreement between counsel that the Appellant would not be required to file a bond is emphatically denied. No such agreement existed. Appellant's counsel, in his affidavit, says that such an agreement existed but the affidavits, four in number, of all counsel of the Appellee state specifically and categorically that there was no such agreement. The Supreme Court Rules require (Rule VII, Section 4) that: "All agreements of counsel in regard to any case or matter pending in court shall be reduced to writing, signed by counsel and delivered to the clerk." Any agreements of counsel with respect to a bond to be given within two months would likewise have to be reduced to writing and delivered to the clerk within the same two months period. If the agreement was to be in lieu of the bond, it would have to be delivered to the clerk before the expiration of the time in which the bond was to be given. Here, no agreement was ever made that the giving of the bond would be waived. The parties could not vary the Court order by agreement without the Court's consent, nor could they agree to alter the statutory provisions concerning bond.

Appellant relies on *Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231, 3 L. ed. 2d 770, 79 S. Ct.

760, that there was a waiving of the bond requirement. In that case there was no dispute that the defendant railroad had induced the plaintiff to delay his suit past the three year limitation. The allegation was made in the complaint and was not denied. It was on the defendant's motions to dismiss the complaint with the allegation that the defendant had fraudently induced the plaintiff to delay bringing his suit under the Federal Employers Liability Act until after the three year statute of limitations had run. The Court merely held that a statute of limitations can be waived on a proper showing amounting to fraud of one of the parties. The case was remanded to the trial court for a determination of "whether petitioner can in fact make out a case calling for application of the doctrine of estoppel."

In this appeal, the alleged agreement asserted by Appellant is disputed. The four affidavits filed by Appellee's counsel all emphatically deny that there was any agreement to waive the giving of bond. The purpose of the Rule (Rule VII, Section 4) requiring all agreements of counsel to be in writing and filed with the Clerk of the Court is to avoid any disputes between counsel and to require the Court to resolve such disputes. In cases brought before the Supreme Court of Appeals of West Virginia, that Court is not a trier of facts, but its jurisdiction and function is to determine if the trial court committed error in the trial. The trial court resolves disputes of fact. The Supreme Court of West Virginia resolves disputes of law.

The law of estoppel is not applicable in this appeal. If it was, it would apply against the Appellant. Pages

30 and 31 of Appellant's brief filed by it in the Supreme Court of West Virginia on December 21, 1967, are copied herein in Appendix, p. 6(a). Therein Appellant asserts that the premium on the $500,000.00 bond would cost $25,000.00. When Appellant's counsel, on November 3, 1967, was served with Appellee's motion to dismiss the appeal theretofore awarded, there still remained 8 days to November 11, 1967, for Appellant to file the required bond to perfect the appeal. Appellant, in its brief of December 21, 1967, (page 30) in opposition to Appellee's motion to dismiss the appeal improvidently awarded or untimely granted, said, "Had that motion been sustained by this Court, then the filing of the supersedeas bond and the $25,000 premium therefor would have been a useless gesture on the part of Appellant. We submit that the time within which the supersedeas bond could be entered into should and must be automatically extended until such time as the Court has disposed of that motion, because otherwise the Appellant would have been required to do a useless and very expensive thing." The bond is for the protection of the Appellee. The statutory provisions are (Code 58-5-14): "If a supersedeas be awarded, to abide by and perform the judgment, decree or order of affirmance, and to pay to the opposite party, and to any person injured all such costs and damages as they, or either of them, may incur or sustain by reason of said appeal, in case such judgment, decree or order, or such part, be affirmed, *or the appeal, writ of error or supersedeas be dismissed.*" (Italics ours). The bond required by the Court and the statute was to protect the Appellee if the appeal should be dismissed, as well as if the order of the trial court should be affirmed. Appellee's motion made on No-

vember 28, 1967, to dismiss the appeal for failure to give the required bond was not made until after the elapse of the statutory time within which to file it. The evident purpose of Appellant in not furnishing the appeal bond within the 8 days from November 3 to November 11, 1967, was to save the alleged bond premium of $25,000.00, and furnish to Appellee no bond to which he could have recourse for his damages if the appeal was dismissed. It may have been a useless thing for the Appellant, although required by the statute, but it was important and useful for the Appellee to secure the payment of his damages if the appeal was dismissed. To extend the time for the giving of the bond until the Court passed on the motion to dismiss the appeal and give it only if the appeal be not dismissed, and not give it if dismissed, would be to perpetrate a hoax on the Appellee. Any appellant should be estopped from such course of conduct.

3. Appellant's contention that the trial court did not properly interpret Section 428 of the Restatement of the Law of Torts does not involve or present a question under the Federal Constitution on this appeal as it was not passed upon by the Supreme Court of Appeals of West Virginia. Nowhere in the petition filed by Appellant in the Supreme Court of Appeals of West Virginia is the violation of the Constitution of West Virginia or the Constitution of the United States raised. See Appendix, p. 4(a)-5(a). Nor does its brief filed with the petition on June 27, 1967, raise or mention such violation.

## ARGUMENT

The Constitution of West Virginia does not define the procedure for appeal from a circuit court to the Supreme Court of Appeals. The authority to do so has been left to the Legislature. Michie's West Virginia Code, Chapter 58. *State* v. *Legg*, 151 W. Va. 401, 151 S. E. 2d 215 (1966).

Likewise, the Constitution of the United States does not define the procedure for appeals to the Supreme Court of the United States. The authority to do so has been left to the Congress and the Court under its rule making power. 28 U.S.C.A. Supreme Court Rules. 28 U.S.C.A. Federal Rules of Civil Procedure.

In West Virginia, there is no appeal to the Supreme Court of Appeals of West Virginia as a matter of right. A petition for appeal may be filed ex parte with oral argument and supporting brief. If the petition is granted, and was presented within the time required, and the bond as required is given within the time required, the alleged errors are then reviewed by the Court after oral arguments by both parties are heard and printed briefs of both parties have been filed with the Court. The Court, thereafter, either sustains the opinion of the court from which the appeal is taken, or reverses it, in whole or in part.

An appeal may be granted with or without supersedeas. If it is granted *without supersedeas*, the bond required is for costs only, but if it is granted *with supersedeas*, then the bond is to pay the opposite party, appellee, and to any person injured, all such costs and

damages as they, or either of them, may incur or sustain by reason of said appeal in case the judgment, or such part thereof, be affirmed, or the appeal or supersedeas be dismissed, and also, to pay all damages, costs and fees which may be awarded against or incurred by appellant. (Chapter 58, Article 5, Section 14).

The giving of the bond required by the court in its order granting the appeal must be given within two months from the date the appeal is awarded. This is a mandatory provision of the statute of West Virginia, Chapter 58, Article 5, Section 16, and by the Rules of the Supreme Court of West Virginia, Rule III, Section 3. The application for the appeal must be applied for within the statutory time allowed for such appeal to be made. Both provisions are in the same statute (58-5-16).

Appellant contends in its Jurisdictional Statement (p. 9) that the action of the Supreme Court of West Virginia by its order of May 20, 1968, violated both the "Constitution of the State of West Virginia, Article 3, Section 10, providing as follows: 'No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.' And the Constitution of the United States, Amendment XIV, providing as follows: '* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' "

Due process of law and equal protection of the laws were fully afforded the Appellant, but the Appellant did not avail itself of the protection of the laws for it did not file the required bond within the time required by the statute, Rules of Court and the Court order to secure that protection. Procedural statutes for the orderly administration of the courts are in the interest of justice for all litigants, plaintiffs and defendants alike. The same statutes and rules which apply to all litigants likewise apply to the Appellant here. Appellant did not have an appeal as a matter of right, but only as a matter of error in the trial court. To secure the right to be heard on appeal, Appellant had the duty and obligation to make its application for appeal timely, and to give the bond required within the time required to have the merits of its appeal passed upon by the Court. This, Appellant failed to do. The Supreme Court of West Virginia did not deprive the Appellant of any rights under either the Constitution of West Virginia or the United States. If, in fact, any rights were lost to the Appellant, it was the result of the Appellant's failure to do the things required of it to be done to secure those rights. The merits, if any there were, in Appellant's appeal were never passed on and decided for proper procedural prerequisites had not been taken by Appellant. If the appeal of Appellant had been taken in proper time and proper bond given in time, the Supreme Court of West Virginia would have passed on all questions presented to it. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court. The jurisdiction of the United States Supreme Court is to review the judgments and de-

crees of state courts when a federal question is presented and is limited to the review of a final judgment or decree, actually or constructively deciding such question, when rendered by the highest court of a state in which a decision in a suit could be had; and, as for want of proper appeal, no final judgment or decree of such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power by the Supreme Court of the United States is wanting.

A case in the Supreme Court of the United States, although certiorari has been granted, will be subsequently dismissed when the lack of jurisdiction is subsequently called to the Court's attention. The Court's inadvertent allowance of a writ of certiorari does not establish jurisdiction.*

Under Federal Rules and Procedure (Federal Rules of Civil Procedure, Rule 73(a) ), the filing of a notice of appeal within the time is mandatory and jurisdictional and prescribed time cannot be extended by waiver or order of court and the right to appeal is lost if notice of appeal is not filed within the time prescribed.**

In *Boggs* v. *Settle*, 150 W. Va. 330, pt. 1 syl., 145 S. E. 2d 446 (1965), the West Virginia Supreme Court held:

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*Montgomery Bldg. & Const. Trades Council v. Ledbetter Erection Co., Ala. 1952, 73 S. Ct. 196, 344 U. S. 178, 97 L. ed. 204. Hartford Life Ins. Co. v. Johnson, Mo. 1919, 39 S. Ct. 336, 249 U. S. 490, 63 L. ed. 722.

**Deena Products Co. v. United Brick & Clay Workers of America, C. A. 6th 1952, 195 F. 2d 612. Certiorari denied. 73 S. Ct. 21, 344 U. S. 822, 97 L. ed. 640.

> "The requirement of Rule 59 (b) of the Rules of Civil Procedure that a motion for a new trial shall be served not later than ten days after entry of the judgment is mandatory and jurisdictional. The time required for service of such a motion cannot be extended by the court or by the parties."

Time within which to appeal and give the required bond, whether for costs or costs and supersedeas, under the West Virginia statute and the Rules of the Supreme Court is likewise procedural and jurisdictional and cannot be waived. *Scott* v. *Coal & Coke Railway Co.*, 70 W. Va. 777, 74 S. E. 992.

Appellant relies on Rule IV, Section 2 of the West Virginia Supreme Court (page 18 of Appellant's Jurisdictional Statement) as authority by which that Court should have allowed it additional time to file its bond as required by that Court in its order of September 11, 1967. It will be noted that any action by the Court under that Rule is to be done "*in its discretion*" and "for cause shown". (Italics ours). The Court is not *required* to act on any matter brought before it under this provision but *may* act and then only in its *discretion* and for good *cause shown*. The refusal of the Court under this section to permit the Appellant to file its supersedeas bond after the time for so doing under its prior order of September 11, 1967, does not raise a constitutional question reviewable by the Supreme Court of the United States.

*Glidden Co.* v. *Aetna Casualty Co.*, 291 S. W. 2d 315 (1956), was an action by materialmen against a surety on the bond furnished by the contractor. The lower court held for the materialmen and the surety

appealed. The necessary appeal bond had to be filed on October 29th. Due to the early closing of the office the respondent was unable to file the bond on that date. The Court held, page 318:

> "The use of diligence to file the bond within the prescribed period, and the reasons for failure to do so, would be material considerations *if* compliance with the rule could be waived or excused or if the time of filing might be extended. It is well settled, however, that the requirement that the bond be filed within 30 days is mandatory and jurisdictional, and that the time prescribed cannot be dispensed with or enlarged by the courts for any reason."

Thus, the Court held the late filing of the bond was fatal to its jurisdiction.

We respectfully submit that the application for appeal in Appellant's Jurisdictional Statement should be denied, or, the judgment of the Supreme Court of Appeals of West Virginia complained of should be affirmed.

Respectfully submitted,

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SUPREME COURT, U. S.

Office-Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, A.D. 1968

No. [redacted] 195

CHEMICAL TANK LINES, INC., A Corporation, *Appellant*

v.

EDWARD W. HOLSTINE, *Appellee*

**On Appeal From the Supreme Court of Appeals of West Virginia**

## APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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IN THE

# Supreme Court of the United States

OCTOBER TERM, A.D. 1967

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No. 1533

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CHEMICAL TANK LINES, INC., A Corporation, *Appellant*

v.

EDWARD W. HOLSTINE, *Appellee*

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**On Appeal From the Supreme Court of Appeals of West Virginia**

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## APPELLANT'S BRIEF

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### ARGUMENT

In Appellee's brief, page 1, paragraph 1A, Appellee is mistaken in its designation of the bond given there as merely a suspending bond. As shown on page 3A, the bond required that if need be the penalty was Five Thousand ($5,000.00) Dollars, and then provided if Appellant Chemical Tank Lines, Inc. "shall well and

truly pay all such damages as any person may sustain . . . then this obligation to be void; else to remain in full force." This did, of course, include costs, as that was the only damage except possible interest which could be sustained. Obviously then this bond could only have been a cost bond, particularly when one considers that the judgment in the trial court was in the amount of $350,000.00.

Appellant is not in error, as contended by Appellee at page 2, paragraph B of his Motion, in that the prayer of Appellant Chemical Tank Lines was "that it be awarded an Appeal, if such be proper, or a Writ of Error, if such be proper, and in either event, be granted Supersedeas to the judgment below."

As to paragraph D, page 2 of Appellant's motion on 7 A the Court in its Order stated, "and presented to the Court its Petition praying for an Appeal from and *supersedeas* to a judgment of the Circuit Court of Kanawha County . . . which being seen and inspected by the Court, the appeal and supersedeas prayed for is granted, but *it* is not to take effect until the petitioner, or some person for it, shall have given . . . bond . . . conditioned according to law." (Italics added).

It will be noted that the Court used the words, "it is not to take effect", meaning, of course, the supersedeas, and did not use the word, "they", which would be the proper word if meant to apply to "appeal *and* supersedeas."

Statement E, page 3 of Appellee's Motion likewise is incorrect, in that the question was raised in both the trial and appellate courts that the ruling of the trial court in granting Instruction 12 was in violation of the

constitutional rights of appellant, and the Constitutions of the State of West Virginia and the United States of America, and further that such construction places an unlawful burden on Interstate Commerce.

Appellant did take exception on constitutional grounds to the allowance of Appellee's Instruction 12 as is reflected on page 2061 of the typewritten transcript of the trial court proceedings. (See Appendix hereto). Appellant's counsel stated that to hold that the trucking industry which hauls trailers by tractors involves an unreasonable risk of harm to others, is unconstitutional under the Constitution of the United States of America and the Constitution of West Virginia because it would involve the taking of property without due process of law and would place an undue burden on Interstate Commerce. In the Circuit Court of Kanawha County in the "Brief of Appellant" page 80, appears the following:

> "Therefore, the trucking industry is a legally permissible industry by virtue of the laws of the United States. We raised the question below and raise it again, that to deprive that industry of its proper rights is violative of its constitutional rights, under both the Federal and State Constitutions."

And in the Supreme Court of Appeals of West Virginia in Appellant's brief, it is stated on page 34:

> "The defendant contended in the trial court, in the Circuit Court and contends in this court that such a holding without any evidence to support it, is taking the defendant's property without due process of law and violative of the Constitution of the United States and violative of the Constitution of West Virginia."

The question of the constitutionality of the Court's interpretation of Section 428, Restatement of the Law of Torts, as will be reflected in the record, was raised properly in the trial court of Kanawha County, on Appeal to the Circuit Court of Kanawha County, and on Appeal to the Supreme Court of Appeals of West Virginia. It can be agreed that this point was not passed upon by the Supreme Court of Appeals of West Virginia, which is Appellant's complaint herein; namely, that the Appeal was dismissed without deciding and passing upon this important and properly raised constitutional question.

Article 8, Section 1, of the Constitution of West Virginia provides that "The judicial power of the State shall be vested in the Supreme Court of Appeals * * *."

Article 5, Section 1 of the same Constitution provides that the "Legislative, Executive and Judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; * * *." *West Virginia State Bar* v. *Earley,* 144 W.Va. 504, 109 S.E. 2d 420 held that the legislature cannot restrict or impair the power of the Courts while *Sims* v. *Fisher,* 125 W.Va. 512, 25 S.E. 2d 216, in construing Article 5, Section 1, held that the legislature cannot commit to the judiciary powers which are primarily legislative.

Recently, on May 14, 1968, in *Cohn et al.* v. *Borchard Affiliations,* the Appellate Division, First Department, of the Supreme Court of the State of New York cited as 289 N.Y.S. 2d 771, in a split decision held, that an enactment by the New York State Legislature of a Rule of Civil Procedure precluding the dismissal

of an action for failure to prosecute unless certain conditions had been met, was unconstitutional as constituting an infringement and invasion by the legislature upon the power of the Court to regulate its own business and the calendar.

The Supreme Court of the State of New York and the Supreme Court of Appeals of the State of West Virginia are both constitutionally created Courts with the Constitutions of both States providing for a separation of the powers of the Judicial and Legislative branches of the States. The legislature of the State of West Virginia in enacting Chapter 48, Article 5, Section 318, set forth on page 5, Appellant's Jurisdictional Statement unlawfully invaded and infringed upon the power of the judiciary in violation of Articles 5 and 8, Sections 1 of the Constitution of the State of West Virginia.

There is no basis to Appellee's contention that the Appeal does not present a substantial Federal question. Substantial Federal questions have been raised by Appellant in its Jurisdictional Statement (3 - 4).

The Federal questions sought to be reviewed here (mainly the dismissal of the Appeal by the Supreme Court of Appeals of West Virginia) were timely raised. They could not and did not arise until the Order of the Supreme Court of Appeals of West Virginia was entered on March 20, 1968, although Appellant did in the trial court raise the question of the constitutionality of Appellee's Instruction 12.

The principal Federal question raised herein was passed upon by the Supreme Court of Appeals of West Virginia. It was timely brought to the attention of

that Court in a Motion to Reconsider and Reinstate the appeal and to set aside the Order of March 20, 1968 which dismissed the appeal and supersedeas. That Court by its Order of March 25, 1968, therefore denied the Appellant its constitutional rights, both State and Federal, when it refused to reconsider the matter. No particular form of words or phrases has ever been declared necessary in which the claim of Federal right must be asserted. It is sufficient if it appears from the record that such rights were specially set up and claimed in the State Court in such manner as to bring them to the attention of that Court.

The judgment of the highest court of West Virginia did not rest on an adequate non-federal basis as urged by Appellee. It is a pulling up of oneself by one's boot straps to say that the West Virginia Court has previously held that the posting of the bond within a required time is necessary to establish jurisdiction, as that is the very issue in question.

It is a condition precedent to the adoption of such statute and procedural rules that they conform to the Constitution of the State of West Virginia and that they do no violence to the Constitution of the United States of America and where, as in this case, the statute clearly invades the power and jurisdiction of the Supreme Court of Appeals of the State of West Virginia such cannot be the basis for a valid dismissal of Appellant's Petition.

An Appellate Court cannot be the final arbitrator of its own rules, if such rules violate the constitutional rights, either State or Federal, of a person aggrieved.

The Appeal in this case was properly taken and this was recognized by the Supreme Court of Appeals for West Virginia when it granted the Appeal. Appellee has cited *John* v. *Paullin,* 231 U.S. 583, 58 L. Ed. 381, and has quoted extensively from that opinion on pages 9 and 10 of its brief. That case quotes with approval *Newman* v. *Gates,* 204 U.S. 89, 51 L. Ed. 385, in which the Supreme Court declined to review a judgment of dismissal by a state Court. However, in *Newman, supra,* the Court said:

> " 'Had the appeal been properly taken, it would have been the duty of the supreme court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon the due faith and credit clause of the Constitution, which, on various occasions, was pressed upon the attention of the trial court.' "

It is the position of Appellant that an appeal was properly taken to the Supreme Court of Appeals for West Virginia and it is submitted that this Court should therefore resolve the Federal question which involves a denial in the state court of Appellant's constitutional rights. *Deena Products Company* v. *United Brick and Clay Workers of America, et al.,* 195 F. 2d 612, 6 Cir., cert. denied, 344 U.S. 822, 97 L. Ed. 640, 73 S. Ct. 21, as cited in both Appellee's Motion and Brief does not involve a situation relevant to the facts in this case. It is clear that a Circuit Court of Appeals under Rule 73(a) of the Rules of Civil Procedure is required to dismiss an untimely filed appeal. However, as Rule 73 states, the failure of an Appellant to take any step other than the timely filing of a Notice of Appeal does not affect the validity of the appeal, but is ground for such

action as the Court of Appeals deems appropriate. The failure to file a bond on appeal or a supersedeas bond, Rule 73 (c) and (d) has not been held to be jurisdictional and grounds for a mandatory dismissal. On the contrary, the Circuit Courts, on application by the Appellee where no bond has been furnished by Appellant, will require Appellant to furnish such a bond and will give him time to do so. The West Virginia statutory provisions governing the condition and time for filing bond is unconstitutional so far as it provides for a mandatory dismissal of an appeal, once allowed, for failure to file a timely bond.

Appellee's argument that federal basis for Court determination cannot be predicated on a Motion for Rehearing is completely without merit. This was the first time that the issue of the dismissal of the appeal for failure to file a timely bond could have been brought to the attention of the West Virginia Court.

On Page 17 of Appellee's brief, counsel for Appellee denies that there was any agreement between counsel for the Appellee and counsel for the Appellant to the end that the Appellant would not be required to file a bond. In view of the sharp disagreement between counsel for the Appellee and counsel for the Appellant, it is submitted that at the least, the Supreme Court of Appeals of the State of West Virginia should have ordered this issue to be remanded to the trial court for the taking of evidence.

All other matters referred to by Appellee, it is submitted, have been adequately covered in Appellant's Jurisdictional Statement. Appellant urges that these

Motions be denied and that this Court note probable jurisdiction and thereafter hear this case on its merits.

Respectfully submitted,

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## APPENDIX

So that the Court will not have to search the voluminous record, we take the liberty of attaching as Appendix hereto those parts of the transcript of the trial proceedings which definitely show that the constitutional question was fully raised in the trial court.

On page 20 of the Brief, Section 3, there is a contention that the question of Section 428 was not raised below. The instruction given was, page 2066 of the transcript:

> "Plaintiff's Instruction No. 12—The Court instructs the jury that under the law in this case Chemical Tank Lines, Inc., is liable for any negligent acts of Dale Samples, and any negligent acts of Dale Samples while operating the tractor-trailer in which Edward Holstine was injured, is to be considered by the jury as negligence of Chemical Tank Lines.
>
> "You are therefore accordingly instructed that because of the stipulation in this case that Dale Samples was negligent in operating the tractor-trailer, and therefore if you believe from a preponderance of the evidence in this case that Dale Samples' negligence proximately contributed to the accident in question and to Edward Holstine's injuries then Chemical Tank Lines, Inc. is chargeable with the negligence of Dale Samples and your verdict may be for the plaintiff. Edward Holstine and against the defendant, Chemical Tank Lines."
>
> Mr. Palmer (counsel for the defendant below): "We have our objection to plaintiff's instructions Nos. 12 and 14 as follows:
>
> 1. There is no evidence upon which to base it.
>
> 2. It creates liability against the defendant Chemical Tank Lines without fault on its part.

3. It purportedly is based upon Section 428 of Restatement of Torts.

4. This section is based upon the premise the liability can be predicated where the 'activity shall involve an unreasonable risk of harm to others.'

5. To hold that the trucking industry which hauls trailers by tractors involves an unreasonable risk of harm to others is unconstitutional under the Constitution of the United States and the Constitution of West Virginia for the following reasons:

   a. To take property without due process of law.

   b. It places an undue burden on Interstate Commerce.

   c. There is no evidence by statistics or otherwise to support any such finding that the trucking industry creates an unreasonable risk of harm to others. In fact, statistics prove the drivers of the trucking industry are more careful than an ordinary and average driver of an automobile.

   d. Such section was created for injuries to the public using the highway and not the employees of the trucking industry."

At the bottom of the transcript, page 2068, it is shown that this was substituted for the original number 12, "This is a new number 12," and counsel for the then plaintiff stated: "We will take it that all of your previous objections cited on the record will be cited to the new instruction number 12."

"MR. PALMER: It is repetitious of Instruction No. 12 and it does not correctly state the law of respondeat superior and it holds as a matter of law the master is responsible for his acts.

"THE COURT: Do you need Instruction No. 12?

"MR. PREISER: I will substitute this one for Number 12, and this is substituted. This is a new Number 12 and we will take it that all your previous objections cited on the record will be cited to the new Instruction No. 12.

"MR. PALMER: I do move all my objections to the old Number 12 and all my argument of law be considered by the Court as objections to and arguments of law against the giving of the new Number 12, and that the Court permit the old Number 12 be made a part of the record for identification so that we will know what we were arguing about originally.

"THE COURT: All right."

The defendant offered its Instruction Number 28, at page 2043 as follows:

"The Court instructs the jury that a corporation carrying on an activity which can be lawfully carried on under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for bodily harm caused to others by the negligence of contractor employed to do work in carrying on the activity.

"Therefore, you are instructed that if you determine from the evidence that Brumfield was a contractor employed to carry on the activity as an inpendent contractor for Chemical Tank Lines, who operated under a franchise granted by public authority, then Chemical Tank Lines can be liable for the acts of Brumfield and his employees and their negligence, if any, only if the activity of operating tractor-trailer vehicles over the highways involves an unreasonable risk of harm to others, and not otherwise."

This instruction brings into focus the exact questions raised in plaintiff's Amended Instruction Number 12.

At page 2021, defendant's Instruction Number 14 was refused, which stated as follows:

> "The Court instructs the jury that the owner of a vehicle owes to a stranger who rides in it only the duty not to use wilful and wanton care not to injure him; that is, the same duty owed a trespasser.
>
> "Therefore, if you find from a preponderance of the evidence that the plaintiff, Holstine, was not an employee of Chemical Tank Lines and was not an employee of Brumfield, as he has claimed from the witness stand, the only duty owed him by Chemical Tank Lines since he was a stranger to them, was not to wilfully or wantonly injure him.
>
> "And if you believe from the evidence, that Chemical Tank Lines did not wilfully or wantonly injure the plaintiff, Holstine, then he cannot recover against Chemical Tank Lines."

Thus we specifically show that this constitutional question was raised in the trial Court both by objections to the giving of the plaintiffs below in Instruction No. 12 and by submitting to the Court instructions covering the points which were refused.

# SUPREME COURT OF THE UNITED STATES

October Term, 1968.

## CHEMICAL TANK LINES, INC. *v.* HOLSTINE.

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

No. 195. Decided October 21, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MR. JUSTICE BLACK dissents.